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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 422.

ISABELLA F. BLACKSTONE, individually and as Executrix of the Last Will and Testament of Timothy B. Blackstone, deceased,
Plaintiff in Error,

against

NATHAN L. MILLER, Comptroller of the State of New York, and EDWARD M. GROUT, Comptroller of the City of New York,
Defendants in Error.

ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR.

LOUIS MARSHALL,
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F. H. Hitchcock, Printer and Bookbinder, N. Y.

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BRIEF FOR THE DEFENDANTS IN ERROR.

Statement.

The plaintiff in error has sued out a writ of error to the Surrogate's Court in and for the County of New York, State of New York, after the proceedings in this cause had been remitted to that Court by the Court of Appeals of the State (Rec., p. 94).

These proceedings were instituted in the Surrogate's Court for the County of New York on November 10, 1900, on the petition of Bird S. Coler, Comptroller of the City of New York, under the provisions of Chapter 908 of the New York Laws of 1896, relating to the taxable transfers of property, and the acts amendatory thereof, for the purpose of subjecting to taxation, under such act, property which it was alleged was subject to such tax which on May 26th, 1900, the day of his death, belonged to Timothy B. Blackstone, then residing without the State of New York (Rec., pp. 2, 3).

On November 12, 1900, pursuant to this petition and the act under which it was filed, the Surrogate directed Charles E. Page, one of the appraisers appointed by the State Comptroller, to fix the fair market value at the time of the transfer of the property which belonged to the decedent, and which was subject to the payment of any tax imposed under the statutes (Rec., pp. 1, 2). Thereupon the appraiser gave notice of his proceedings to Isabella F. Blackstone, the executrix of the last will and testament of Timothy B. Blackstone, deceased, citing her to appear before him on December 12, 1900, at a time and place stated (Rec., p. 3).

At the time designated the plaintiff in error appeared in these proceedings both individually and as executrix of the last will and testament of Timothy B. Blackstone, deceased, and objected to the appraisal and taxation under the laws of the State of New York relating to taxable transfers, of any property as passing by transfer under such will on various grounds specified, among others, that the taxation of any property of the said Timothy B. Blackstone in this proceeding would be unconstitutional and void for reasons which were particularized (Rec., pp. 4, 5).

The plaintiff in error at the same time filed an answer (Rec., pp. 8–12), and thereafter, on January 31, 1901, the appraiser reported that he appraised the estate of the decedent at its fair market value on the 26th day of

May, 1900, the day of the death of the said decedent, as follows:

"Property of decedent in this State subject to tax in this proceeding, consisting wholly of cash on deposit with the United States Trust Company, amounting to	$4,843,456.72
And with Cuyler, Morgan & Co., amounting to	10,692.24
Total	$4,854,148.96
The proportionate amount of deductions in this State amount to	300,539.38
Leaving a net personal estate of (Rec., p. 6)."	$4,553,609.58

On February 20th, 1901, the report of the appraiser was presented to the Surrogate, and an order was made fixing the cash value, at the date of the decedent's death, of the property the transfer of which was liable to taxation in the proceeding, the tax for which it was liable being stated in such order (Rec., p. 64).

Notice of the assessment of the tax was thereupon given to each of the beneficiaries named in the testator's will, and service thereof made upon each of the persons interested in the estate (Rec., pp. 64–66).

On February 25th, 1901, Isabella F. Blackstone, individually and as executrix, appealed to the Surrogate's Court of the County of New York from each and every part of the appraisement, assessment and determination of tax herein, and from each and every part of the report of the appraiser, and of the order entered thereon purporting to assess and fix a tax upon the transfer of the property of the decedent, upon grounds which were stated in the notice of appeal (Rec., pp. 66–68).

On July 26th, 1901, the Surrogate's Court, after hearing this appeal, reversed the order of February 20th, 1901, and the transfers therein referred to were

declared to be exempt from any tax under the laws of the State of New York (Rec., pp. 68, 69).

An appeal was taken from this determination by the Comptroller of the City of New York to the Appellate Division, First Department of the Supreme Court of the State of New York, on August 12th, 1901 (Rec., p. 70), and on February 7th, 1902, the order of the Surrogate's Court so appealed from was reversed and the order of that Court entered on February 20th, 1901, was affirmed (Rec., pp. 72–74).

An appeal was then taken to the Court of Appeals by the present plaintiff in error from the order of the Appellate Division (Rec., p. 74), and on June 25th, 1902, that Court in all respects affirmed the order of the Appellate Division and remitted the proceedings to the Surrogate's Court of New York County, there to be proceeded upon according to law (Rec., p. 87).

In the answer filed by the plaintiff in error it is alleged that Timothy B. Blackstone was at the time of his death, and for many years prior thereto, a resident of Chicago, Illinois; that he never lived or did business in the State of New York, and for many years prior to March, 1899, was the president of the Chicago and Alton Railroad Company and was a large holder of its preferred and common stock; that during that month an agreement was made by the holders of more than a majority of each class of such stock to sell their holdings to certain persons acting on behalf of themselves and others for the purpose of such purchase; that by the terms of such agreement the vendors were to deposit their certificates of stock with the United States Trust Company of New York, receiving in payment therefor $200 for each share of preferred stock and $175 for each share of common stock; that on or about March 29th, 1899, the decedent, having determined to sell his stock on the terms specified, forwarded to the trust company by express from Chicago certificates for 11,450 shares of preferred stock and 15,077 shares of the common stock of the railroad company owned by him, but instead of having the proceeds of sale im-

mediately remitted to him by the trust company in accordance with a special agreement previously made by him with the trust company, he directed it upon receipt of the stock to hold temporarily the proceeds thereof to his credit individually until his further order; that by the terms of such special agreement the trust company was to hold such sums subject to his order and was to pay him interest thereon at the rate of 2½ per cent. per annum, and to repay the principal on demand provided that notice of not less than two days should be given to the trust company before any portion of such principal in excess of $100,000 was demanded (Rec., p. 9).

The answer proceeds to allege:

"that the decedent accepted such terms and received "the acknowledgment of said trust company, that it so "held to his credit individually on the 31st day of "March, 1899, the sum of $4,881,522.21 * * * that "his object in allowing such proceeds to remain transi- "torily in the City of New York was to avoid the risk "and expense of their transfer to Chicago and their "probable retransfer to New York when he had deter- "mined what permanent investment of them he should "make; * * * that at the time of the decedent's "death the balance of such deposit, including the in- "terest credited by said trust company * * * was "$4,843,456.72 * * * that at the time of the "decedent's death the firm of Cuyler, Morgan & Co. "bankers, of the City of New York, and transfer agents "of said Chicago & Alton Railroad Company, was in- "debted to him in the sum of $10,692.24, being the "balance of his deposit account with said firm." (Rec., pp. 9, 10).

The answer further alleges that no proceedings for the probate of the will or the administration of the estate of the decedent had been taken in the State of New York; that the respondent and all the next of kin and legatees of the testator reside either in the City of Chicago, or elsewhere without the State of New York; that prior to the institution of this proceeding, proceedings were duly taken in the County Court of Cook County, Illinois, under an act to tax inheritances, for

the imposition of a tax upon the real and personal estate of the decedent, and that the above mentioned balances with the United States Trust Company of New York, and Messrs. Culyer, Morgan & Co., were appraised in that proceeding and a tax fixed on the right of succession to the estate of the decedent was based thereon, and paid on November 26th, 1900 (Rec., p. 10).

In an affidavit by an officer of the Trust Company, filed on behalf of the plaintiff in error, it was alleged that "this deposit could have been withdrawn at any time by said Timothy B. Blackstone; said Trust Company issued no certificate of deposit nor pass-book at the time it undertook such deposit, and the only entry evidencing such deposit was the account so opened in said Trust Company's ledger, entitled 'Deposits in trust. Draft account'" (Rec., p. 56).

The last will and testament of the decedent, after making various bequests, devised and bequeathed to the plaintiff in error the bulk of his estate, and appointed her as his sole executrix (Rec., pp. 12-15). The inventory filed by her in the Probate Court at Cook County on September 26th, 1900, specified as personal property the following items (Rec., p. 18):

"Deposit in bank, New York City		$4,854,148 96
"Note Am't on deposit U. S. Trust Co	4,843,457 72	
"Note amount on deposit Culyer, Morgan & Co	10,692 24	

In the proceedings instituted to fix the amount of transfer tax payable under the laws of Illinois, the inventory contained the following items (Rec., p. 30):

"Cash on deposit with Culver, Morgan & Company, New York City, N. Y.	10,692 24
"Cash on deposit with United States Trust Co., New York City, N. Y.	4,843,456 72"

The correspondence passing between the decedent and the officers of the United States Trust Company

relative to the sale of his shares of stock and the deposit of the proceeds is to be found at pages 57–60 of the Record.

The charter of the Trust Company is appended to the brief of the plaintiff in error, and shows that its powers with respect to deposits are simply "to receive moneys in trust and to accumulate the same."

Assignment of Errors.

Upon these facts the plaintiff in error has predicated the following assignment of errors:

1. That the property which is the subject of taxation is situated in the State of Illinois, and that the tax laws of the State of New York have no application thereto, and the Courts of that State have no jurisdiction to assess a tax upon said property or upon the transfer or inheritance thereof or the succession thereto.

2. That if the debts due the decedent at the time of his death from the United States Trust Company of New York and the firm of Cuyler, Morgan & Co. could be deemed for any purpose property then situated within the State of New York, that such property was only transitorily within said State and the Courts of that State had no jurisdiction under Sections 8 or 10 of Article I of the Constitution of the United States, or otherwise, to assess a tax thereon.

3. That the Statute of the State of New York relating to the taxable transfers of property applied to the facts and circumstances of this case, and the authority exercised under said Statute, as interpreted by the decision and judgment herein, are unconstitutional and void on the ground that they are repugnant to Section 10 of Article I of the Constitution of the United States, in that said statute and authority impair the obligation of contracts between said Timothy B. Black-

stone and the United States Trust Company of New York and Cuyler, Morgan & Co. of New York.

4. That said statute of the State of New York, as interpreted by said decision and judgment, and the authority exercised under said statute, are unconstitutional and void on the ground that they are repugnant to Section 1 of Article IV. of the Constitution of the United States, in that said statute and authority deny full faith and credit in the State of New York to the public acts, records and judicial proceedings of the State of Illinois under which the inheritance, succession or transfer tax upon the property which was the subject of this cause had been duly assessed, levied and paid.

5. That said statute of the State of New York as interpreted by said decision and judgment, is unconstitutional and void on the ground that it is repugnant to Section 2 of Article IV. of the Constitution of the United States, in that said statute deprives the plaintiff in error and other citizens of Illinois, as well as citizens of other States, of certain privileges and immunities of citizens of the State of New York.

6. That said statute of the State of New York as interpreted by said decision and judgment, is unconstitutional and void on the ground that it is repugnant to Section 1 of Article XIV. of the Constitution of the United States, in that said statute abridges the privileges and immunities of the plaintiff in error, and of other citizens of the United States, deprives said citizens of their property without due process of law, and denies to said citizens the equal protection of the laws.

The defendants in error will urge that the act in regard to taxable transfers of property enacted by the Legislature of the State of New York, as interpreted by the decision and judgment now sought to be reviewed, is not susceptible to any of the above criticisms, but is in every respect a valid exercise by the State of New York of its taxing power.

POINTS.

I.

Whether the "deposits" made by the decedent with the Trust Company and Cuyler, Morgan & Co. be regarded as "money" within the State of New York belonging to him at the time of his death, or as a "debt" owing to him at that time by these "depositaries," the Court of last resort of that State has declared it to be the intention of the Legislature of that sovereignty to tax the succession to such money or credit although the decedent was at the time of his death a resident of Illinois.

I. The Statute Law of New York.

The law of New York relative to taxable transfers is a portion of the Tax Law of that State, embodied in Chapter 908 of the Laws of 1896, entitled "An Act in Relation to Taxation, Constituting Chapter 24 of the General Laws," which is a mere codification of the statute law as previously in force since 1885. Article X. of that act bears the caption "Taxable Transfers."

Section 220 of that act, as amended by Chapter 284 of the Laws of 1897 (which went into effect on April 16th, 1897), and which since that time has remained unchanged, so far as material, reads as follows:

"A tax shall be and is hereby imposed upon the the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein, or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases: 1. When the transfer is by will or by the inter-

state laws of this state from any person dying seized or possessed of the property while a resident of the state. 2. When the transfer is by will or intestate law of property within the state and the decedent was a non-resident of the state at the time of his death."

So far as this particular provision of the act is concerned it has not been materially changed since 1887.

By the New York Statutory Construction Law, which is Chapter 1 of the General Laws of the State and is applicable to every statute unless its general language or the context of the language construed, or other provisions of law, indicate that a different meaning or application was intended from that required to be given by the chapter, the following definitions are given:

"§ 2. Property. The term property includes real and personal property.

"§ 3. Real Property. The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal.

"§ 4. Personal Property. The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated wholly or in part, and everything except real property which may be the subject of ownership. The term chattels includes goods and chattels."

Section 2, Subdivision 4, of the Tax Law reads as follows:

"The terms 'personal estate' and 'personal property,' as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate; public stock, stocks in moneyed corporations, and such portion of the capital stock of

incorporated companies, liable to taxation on their capital, as shall not be invested in real estate."

Section 242 provides:

"The words 'estate' and 'property' as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this state. The word 'transfer' as used in this article shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed."

II. THE DECISIONS OF NEW YORK CONSTRUING THESE STATUTES:

These provisions and those which preceded them, of which they are simply re-enactments, and others in *pari materia*, have been adjudged to impose a tax upon the right of succession to the property of a decedent, and not upon a decedent's estate as such, and, in effect, to limit the power of testamentary disposition, and that legatees and devisees take their bequests and devises subject to this tax imposed upon the succession to property. In other words, it is a tax upon the right to take property by devise or descent.

Matter of Merriam, 141 N. Y., 479, 480.
Matter of Hoffman, 143 N. Y., 329, 331.
U. S. vs. Perkins, 163 U. S., 625, 628, 629.
Scholey vs. Rew, 23 Wall., 331, 348.
Magoun vs. Illinois Trust & S'vgs. Bk., 170 U. S., 283, 288.
Knowlton vs. Moore, 178, U. S., 41, 57, 59, 60.
Plummer vs. Coler, 178 U. S., 115, 121, 122.

The constitutionality of a tax on the succession to property has been uniformly recognized and is no

longer open to question, since the elaborate consideration which the subject received in the opinion of Mr. Justice McKenna in *Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283, 287, 288.*

The courts of New York have had occasion to frequently apply this statute to the succession to personal property of non-residents which at the time of the death of the decedent was within the State.

In *Matter of Romaine (127 N. Y., 80)*, which was decided in 1891 and arose under the Collateral Inheritance Act of 1885 providing that "all property which "shall pass by will or by the intestate laws of this "state from any person who may die seized or pos-"sessed of the same, or if such decedent was not a "resident of this state at the time of death, which "property or any part thereof shall be within this "state" shall be liable to a tax as prescribed, it was held that although Romaine was for ten years prior to his death a resident of and domiciled in the State of Virginia, securities consisting of stocks and bonds of different corporations and a mortgage upon real estate in the City of New York, kept by him in a box in a safe deposit company in the City of New York, and deposits kept by him in various savings banks in that city, were liable to taxation.

In the course of his opinion, which construed the statute, Judge Vann said:

"Where, however, the money of a non-resident is invested in this State, as it was by Mr. Romaine, in the bond and mortgage in question, and in the deposits made by him in the savings banks, or where the property of a non-resident is habitually kept, even for safety, in this State, we think that the statute applies both in the letter and spirit. Such property is within this State in every reasonable sense, receives the protection of its laws and has every advantage from government, for the support of which taxes are laid, that it would have if it belonged to a resident. We think that a fair construction of the act permits no distinction as to such property, based simply upon the residence of the deceased owner. We have nothing to do with the policy of the statute, as our duty is dis-

charged when we declare its meaning and apply it to the case in hand."

In *Matter of Houdayer 150 N. Y., 37*, decided in 1896, it appeared that the decedent died at Trenton, New Jersey, where he had resided for a number of years. Many years before his death he had opened an account with the Farmers' Loan and Trust Company of the City of New York, in which he made deposits from time to time of moneys belonging to a trust estate, as well as moneys belonging to himself. This continued as an open running account until his death, when a large balance remained to his credit

The question arose as to whether or not this fund was properly within the State of New York with the meaning of the Taxable Transfer Act. The Appellate Division (*3 App. Div., 474*), held that it was not, on the ground that the relation existing between the trust company and the decedent was that of debtor and creditor. The Court of Appeals, however, decided that it was subject to taxation, recognizing the fact that although a deposit of money in a bank is technically a debt, it was still money for all practical purposes and as such came within the purview of the statute.

In announcing the decision of the Court, Judge VANN said :

" While a majority of my associates concur in the result reached by me, they do not all concur in the reasons given therefor. *They are of the opinion that a deposit of money in a bank, although technically a debt, is still money for all practical purposes and as such is taxable under the Transfer Tax Act.*"

The reasoning of Judge VANN which led to this result is so clear that it is deemed important to quote therefrom at length :

" What was the real thing, the essence of the transaction, that gives rise to the controversy? The decedent brought his money into this state, deposited it in a bank here, and left it here until it should suit his

convenience to come back and get it. While the commingling of funds may complicate administration it does not change the facts as thus stated. If he had deposited it *in specie*, to be returned *in specie*, there can be no doubt that the money would be property in this state subject to taxation. But, instead, he did as business men generally do, deposited his money in the usual way, knowing that, not the same, but the equivalent, would be returned to him upon demand. While the relation of debtor and creditor technically existed, practically he had his money in the bank and could come and get it when he wanted it. It was an investment in this state subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this state. The depository was a resident corporation, and the receiving and retaining of the money were corporate acts in this state. Its repayment would be a corporate act in this state. Every right springing from the deposit was created by the laws of this state. Every act out of which those rights arose was done in this state. In order to enforce those rights, it was necessary for him to come into this state. Conceding that the deposit was a debt; conceding that it was intangible, still it was property in this state for all practical purposes, and in every reasonable sense within the meaning of the Transfer Tax Act *(In re Romaine*, 127 N. Y., 80, 89).

" While the distribution of the fund belongs to the state where the decedent was domiciled, as such distribution cannot be made until his administrator has come into this state to get the fund, possibly, after resorting to the courts for aid in reducing it to possession, the fund has a *situs* here, because it is subject to our laws. A reasonable test in all cases, as it seems to me, is this: Where the right, whatever it may be, has a money value and can be owned and transferred, but cannot be enforced or converted into money against the will of the person owing the right, without coming into this state, it is property within this state for the purposes of a succession tax. Thus the right in question is property, because it is capable of being owned and transferred. It is within this state, because the owner must come here to get it. It is subject to taxation, because it is under the control of our laws. It has a money value, because it is virtually money, or can be converted into money upon demand. It is subject to a transfer tax, because the passing, by gift or inheritance of 'all property, or interest therein,

3336

whether within or without this state, over which this state has any jurisdiction for the purposes of taxation, comes within the expressed intent of the legislature.

"I regard further discussion as unnecessary, as I have fully expressed my views as to the scope of the statute in the *Bronson* case, decided herewith."

The case cited was brought to this Court on a writ of error under the title of *Scudder vs. Comptroller of New York (175 U. S., 32)*, where the writ was dismissed for want of jurisdiction.

In the present case the Appellate Division of the First Department of the Supreme Court of the State of New York unanimously decided against the plaintiff in error on the authority of *Matter of Houdayer* (Rec., pp. 76, 77); and the Court of Appeals, without opinion, affirmed the order appealed from "on the "ground that this case is controlled by *Matter of* "*Houdayer, 150 N. Y., 37*" (Rec., p. 96), Judges HAIGHT and GRAY, who had dissented in the latter case, concurring in the decision in the present case.

The *Houdayer Case* was cited with approval in *Callahan vs. Woodbridge (171 Mass., 595)*, where a statute providing for a collateral legacy tax on property within the commonwealth, "whether tangible or "intangible," was applied to real estate within the State, and to cash and railroad bonds of other States which were deposited within the State of Massachusetts.

It was likewise cited in *Eidman vs. Martinez (184 U. S., 587)*, as was also *Matter of Romaine (supra)*.

Deposits in banks have been held assessable under this system of legislation in other cases.

Matter of Burr. 16 Misc. Rep., 89.
Matter of Morejon, N. Y. Law Journal, July 3, 1891.
Matter of Bondon, N. Y. Law Journal, March 1, 1892.
Estate of Spier, 6 Ohio Dec., 898.

The highest Court of New York has thus interpreted the statute now under consideration as providing that

where a non-resident dies leaving a deposit in a bank or trust company within the State of New York, a transfer by will or intestate law of such deposit is a transfer of money—"of property within the state," and as such is governed by the provision of *Section 220* of the *Tax Law.*

III. The Effect of the Interpretation by the New York Courts of its Tax Laws.

Without now considering the effect of such an interpretation upon the validity of the act, it is submitted that the construction by the Court of Appeals of New York of this statute is to be regarded as an authoritative declaration of what the law of New York is, which will be adopted by this Court under the principle announced in a multitude of cases, a few of which only need be cited.

"The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text."

Leffingwell vs. Warren, 2 Black., 599, 603.

The meaning of a State statute declared by the highest Court of the State is conclusive upon this Court.

Randall vs Brigham, 7 Wall., 523, 541.

As was said by Mr. Justice Shiras in *Morley vs. Lake Shore Railway Co., 146 U. S., 167 :*

"If then, the law enacted by the legislature, and construed by the state judiciary, will be the law of the State, it follows that, as to the proper construction of the statute, and as to what should be regarded as among its terms, no Federal question could arise. The most that could be claimed would be that, although the statute of the State was unobjectionable, yet the State court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law, which latter question alone is, by the plainest possible terms of the Consti-

tution and judiciary act, subject to investigation here. Assuming then, that the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself as construed by the State court."

Thus, in *Burgess vs. Seligman (107 U. S., 33)*, Mr. Justice BRADLEY said:

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is."

Flash vs. Conn., 109 U. S., 379.
Bucher vs. Cheshire R. R. Co., 125 U. S., 584.
German Bank vs. Franklin Co., 128 U. S., 538.
Amy vs. Watertown, 136 U. S., 318.
Gormley vs. Clark, 134 U. S., 348.
Detroit vs. Osborne, 135 U. S., 500.
Halstead vs. Buster, 140 U. S., 277.
Bauserman vs. Blunt, 147 U. S., 647.
Balkam vs. Woodstock, 154 U. S., 189.
Hartford Ins. Co. vs. Chicago Ry. Co., 175 U. S., 108.

In *Wade vs. Travis County (174 U. S., 499, 508)* Mr. Justice BROWN said:

"In determining what the laws of the several states are which will be regarded as rules of decisions we are bound to look not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them."

In *Williams vs. Eggleston (170 U. S., 311)* the principle was applied to the subject of taxation and the decision of the Supreme Court of Connecticut construing

the statute was followed, although it was by a divided Court. Mr. Justice BREWER said:

"It is true there was a division of opinion between the members of the state Supreme Court, but such division, although a close one, does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive upon us. When the state court decides that municipal corporations within the territorial limits of the state are subject to the control of the state legislature, and that its act in creating for certain purposes a new corporation and merging therein five separate towns was valid, this court cannot hold that the state court was mistaken in its construction of the state constitution or in its declaration as to the extent of the power of the legislature over municipal corporations. Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement."

In *New Orleans vs. Stempel (175 U. S., 309, 316)*, Mr. Justice BREWER said:

"When the question is whether property is exempt from taxation and that exemption depends alone upon a true construction of the statute of the state, the federal courts should be slow to declare an exemption in advance of any decision by the courts of the state. The rule in such a case is that the federal courts follow the construction placed upon the statute by the state courts, and, in advance of such construction, they should not declare property beyond the scope of the statute and exempt from taxation unless it is clear that such is the fact. In other words, they should not release any property within the state from its liability to state taxation, unless it is obvious that the statutes of the state warrant such exemption or unless the mandates of the federal constitution compel it."

This principle has even been applied in cases where the jurisdiction of this Court has been invoked because of an asserted impairment of contract rights arising from the effect given to subsequent legislation, in respect to which the duty is imposed upon this Court to exer-

cise an independent judgment as to the nature and scope of the contract. But as was said by Mr. Justice WHITE in *Board of Liquidation vs. Louisiana (179 U. S., 622, 638)*,

"Nevertheless, when the contract, which it is alleged has been impaired, arises from a state statute, as said in Burgess vs. Seligman, 107 U. S., 20, 34, 'for the sake of harmony and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts, if the question seems to them balanced with doubt.'"

In *Yazoo & Mississippi Val. R. R. Co. vs. Adams (181 U. S., 580, 583)*, which likewise involved a question as to whether the obligation of a contract had been impaired, Mr. Justice BROWN said:

"The right asserted depends upon a comparison and construction of such statutes; and the settled rule of this Court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the State statute which has been adopted by the court of last resort in that State."

In the present case it will be seen that the question of impairment of contract cannot legitimately arise since the decedent's deposits were made long after the enactment of the statute now under consideration, and after the decision in the Houdayer case.

IV. THE CORRECTNESS OF THE DECISION IN THE HOUDAYER CASE.

If, however, it became necessary to consider the soundness of the reasoning of Judge VANN in the *Houdayer Case*, which resulted in such interpretation, potent considerations might be urged in support thereof, especially on the facts as established in the present record.

1. For all practical purposes the deposits of the decedent which have been made the basis of the assessment of the tax under consideration were moneys within the State of New York.

Whatever the technical form of the transaction, speaking colloquially, Mr. Blackstone had deposited his money with the trust company and Cuyler, Morgan & Co. In the inventory of his estate, filed in Illinois, it was spoken of an "amount on deposit." In the inventory submitted by the Illinois appraiser it was spoken of as "Cash on deposit." In the correspondence between Mr. Blackstone and the trust company, the former spoke of "the price agreed upon" for his stock "if deposited with the United States Trust Company for my account." He further says: "If I sell "my stock I am at a loss to know how I can safely "invest the proceeds, and may wish to deposit a con- "siderable sum for several months with the U. S. "Trust Company." The Trust Company expresses its willingness to accept "on deposit for your account the "proceeds of such sale." And again: "In compliance "with your instructions these several amounts have "been deposited with this company to your individual "credit and as executor as per advices herewith" (Rec., pp. 57–60).

The money was carried by the Trust Company on its books as a "*deposit in trust.*"

The average citizen if called upon to describe the nature of his deposit in such an institution would invariably refer to it as so much cash or money on hand. He would carry it in his cash account, just as the answer in the present case, speaking of the deposit made by the decedent as trustee of the estate of H. B. Norton at the same time when he made his own deposit, says: that in the "case of the estate of "the said Henry B. Norton, deceased, he accom- "plished such permanent investment and *withdrew all* "*of said moneys* prior to his death, but that in the "case of his personal *funds*, owing to ill health he "was unable to find any satisfactory investment for "more than $192,000 of such deposit" (Rec., p. 9).

Special attention is called to *Bluefield Banana Co. vs. Board of Assessors (49 La. Ann., 43)*, and *Parker, Tax Collector vs. Strauss & Co. (49 La. Ann., 1173)*,

which were cited with approval in *New Orleans vs. Stempel* (*175 U. S., 314, 315*), and in the second of which cases the Court said :

" *The revenue act, in entire accordance with the conceded extent of the taxing power, taxes the movable property of a foreigner. We cannot hold that cash thus liable to taxation is exempted, because for convenience it is deposited in bank and checked on by the owner. It would be a strain to apply to the deposited cash the exemption from taxation accorded to debts in their ordinary significance, due to the foreign creditor.*"

There are obvious reasons for this view. The deposit of money in such institutions exacts from the State the provision of continual safe-guards, civil, police and military, for the benefit of the depositor.

For the protection of those leaving their money with banks and trust companies, the State of New York has devised an elaborate system of investigation, supervision and administration of institutions of this class.

Taxation is the correlative of protection, and is as applicable to a non-resident owner of property as to a resident owner.

2. The deposit with the United States Trust Company did not, however, partake of the nature of a general deposit, but was a special deposit in trust.

The charter of the United States Trust Company (Chap. 204, L. 1853, as amended) empowers the corporation :

" 1. To receive *moneys in trust*, and to accumulate " the same at such rate of interest as may be obtained " or agreed on, or to allow such interest thereon as " may be agreed on, not exceeding in either case the " legal rate."

Acting under this power, the money left with the trust company by Mr. Blackstone was entered in the ledger, entitled " Deposits in Trust. Draft Account " (Rec., p. 56).

The charter does not confer upon the trust company the general powers of a bank of deposit. It is a trustee, pure and simple. Hence, the relation existing between it and one depositing moneys with it, is not that of debtor and creditor, but of trustee and *cestui que trust.*

There is no doubt that when Mr. Blackstone delivered his shares of stock of the Chicago and Alton Railroad Company to the Trust Company the latter held them in a fiduciary capacity, and in view of the terms of the charter of the Trust Company it is difficult to appreciate that the latter was any the less a trustee as to the proceeds of such shares, when in accordance with the conditions of the sale, it was provided, that the price agreed upon should be deposited with the Trust Company for the account of Mr. Blackstone. If the shares had continued in the possession of the Trust Company until Mr. Blackstone died they surely would have been subject to taxation.

By what alchemy did the proceeds of these shares become non-taxable although they were left by Mr. Blackstone in New York for the purpose of reinvestment "to avoid the risk and expense of their transfer to Chicago and their probable retransfer to New York" when he had determined what permanent investment of them he should make? (Rec., p. 9).

In a recent case the Court of Appeals, speaking of trust companies organized under the laws of New York, said:

"It is very obvious that trust companies are not in a legal or commercial sense engaged in the business of banking."

Jenkins vs. Neff, 163 N. Y., 320, 330, affd. 186 U. S., 230, 234.

People vs. Binghampton Trust Co., 139 N. Y., 185, relied upon by the plaintiff in error has no application here. That action was one to recover a penalty on the theory that the defendant solicited or received deposits as a savings bank; and it was merely decided that it

had not violated the penal law. Judge GRAY made this clear when he said (p. 191):

"In discussing whether acts were in violation of law, I have, of course, had in mind the statutory prohibition or provision in the Section of the Banking Law referred to. I have not had reference to the statute under which the defendant is incorporated. We are not concerned with the question of whether it has violated any provision of its charter. That question is not here."

3. But treating the deposit of the proceeds of these shares of stock as an ordinary deposit, it is nevertheless believed that it was property of the decedent within the State of New York.

While under the law of New York in one sense the relation between a bank and a depositor is that of debtor and creditor, yet the relation is not that of a lender and borrower, but resembles in many of its aspects that of a bailor and bailee.

In *Downes vs. Phœnix Bank of Charlestown (6 Hill, 297)* Mr. Justice BRONSON said:

"It is not strictly a deposit, nor a bailment of any kind; for the same thing is not to be returned, but another thing of the same kind and of equal value. In the civil law it is called a *mutuum*, or loan for consumption. Except where the deposit is special, the property in the money deposited passes to the bank, and the relation of debtor and creditor is created between the parties. Still the commonly received opinion is, that the banker cannot be sued for the money until after the customer has drawn for it, or in some other way required its repayment. Mr. Justice STORY says, 'the bank is to restore the money whenever it is demanded.' * * * Here the contract to be implied from the usual course of the business is, that the banker shall keep the money until it is called for. *Although it is not strictly a bailment, it partakes in some degree of that character. That is enough to distinguish it from the ordinary case of a debt payable on demand,* though it must be admitted that the distinction is not a very strong one."

In *Payne vs. Gardiner (29 N. Y., 146)*, Mr. Justice MULLIN said:

"A deposit of money with a bank of private person is what is known in the civil law as a *mutuum* or irregular deposit—the distinction between the two kinds of deposit not being recognized by the common law. When money is borrowed and no time of payment is fixed by the contract of loan, the debt, as already stated, is instantly due, and an action may be brought, without demand—the bringing of the action being a sufficient demand to entitle the lender to recover. Even if the debt is by the terms of the agreement to be paid on demand, yet no special demand is necessary; the money being due without it. In the cases of deposits, however, a demand was, by the civil law, and is now, by our law, absolutely essential to a right of action, unless there was a wrongful conversion, or some loss by gross negligence on the part of the depositary. In the case of a *mutuum* or irregular deposit, a demand was necessary to perfect the liability of the depositary. It is said by Pothier (see his work on Contracts, by Evans, 2 Vol. 126): 'When a man deposits money in the hands of another, to be kept for his use, *the possession of the custodian ought to be deemed the possession of the owner* until an application and refusal, or other denial of the right; for, until then, there is nothing adverse, and I conceive, that upon principle, no action should be allowed in these cases, without a previous demand—consequently, that no limitation should be computed further back that such demand.' * * * I entertain no doubt but that the transaction in question was a deposit, and that the rights and liabilities of the parties are precisely the same as if the money had been in a bank."

In *Howell vs. Adams (68 N. Y., 321)* Judge ANDREWS said:

"The fact that a certificate is given on a deposit being made, payable on the return of the certificate, instead of leaving the deposit subject generally to check or draft, does not change the reason of the rule that a banker must first be called upon for payment before an action can be maintained."

In *Munger vs. Albany City National Bank (85 N. Y., 587)* Chief-Judge FOLGER said:

"But the authorities in this state are, that no right of action exists against a depositary of money until an actual demand of it, and that such is the case, though it is in the power of the owner of the deposit to make it due and payable at any time by his own act of making the demand."

In *Boughton vs. Flint (74 N. Y., 482)* Judge RAPALDO said:

"We think that the transaction amounted to a simple deposit upon which the statute would not begin to run until a demand and refusal to pay, or some equivalent act. The money was not loaned to the testator at his request, but was being kept by him for his wife at her request, and he was not in default in not paying it over until she should demand it, as he was requested to keep it until then. *For the same reason he was not chargeable with interest thereon, without a special agreement.*"

In *Smiley vs. Fry (100 N. Y., 265)*, Judge MILLER said:

"Being a deposit, a demand of the money was essential to a right of action, unless there was a wrongful conversion or loss by some gross negligence on the part of the depositary. The distinction between a deposit and a loan is considered in *Payne v. Gardiner (29 N. Y., 146)*, and within the rule there laid down the instrument in question was a certificate of deposit, and, in such a case, *no indebtedness arose by reason of such deposit until a demand was made for the amount deposited.*"

To the same effect are

Dickinson vs. Bank, 152 Mass., 49, 55.
Girard Bank vs. Penn Township Bank, 39 Pa. St., 92, 98, 99.
U. S. vs. Wardwell, 172 U. S., 48, 54, 55.

Especial attention is once more called to *Parker, Tax Collector vs. Strauss & Co., 49 La. Ann., 1173,*

cited with approval and followed in *New Orleans vs. Stempel, 175 U. S., 314, 315.*

4. Again, treating this fund as a debt; for all practical purposes it was property within the State of New York.

(a) Under the law of New York, debts owing by a resident of the State to a non-resident are attachable in an action brought against the latter, and the domicile of the debtor is treated as the *situs* of the property.

Section 649 of the Code of Civil Procedure, provides that a levy under a warrant of attachment, is to be made upon personal property not capable of manual delivery by leaving a certified copy of the warrant and a notice showing the property attached with the person holding the same, "or, if it consists of a demand other than as specified in the last subdivision, with the person against whom it exists."

Accordingly, in *Dunlop vs. Paterson Fire Ins. Co. (12 Hun, 627; affd. 74 N. Y., 145)* money deposited with the Clerk of a Court in lieu of an undertaking on appeal by a foreign corporation was held to be liable to an attachment in an action by a third person against the depositor, even though a Receiver of the corporation had been appointed in another State.

In *Douglas vs. Phœnix Ins. Co. (138 N. Y., 209)* while it was held that the law of a state cannot make a debtor who is actually a non-resident a resident by so declaring, at least so as to bind another jurisdiction by the declaration, yet Chief Judge ANDREWS said:

"But it is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process in order to confer jurisdiction. In the case of moveables their seizure under the attachment shows that their actual *situs* is within the jurisdiction. But in respect to tangible interests, debts, choses in action, bonds, notes, accounts, interes to in corporate stocks and things of a similar nature the question whether the *res* is within the jurisdiction of the sovereignty where the process is issued, is not so readily determined. The general is well settled that the *situs* of debts and obligations is at the domicile of the creditor. But the attachment laws of our

own and other states recognize the right of a creditor of a non-resident to attach a debt or credit owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a state, for the purposes of attachment proceedings, may fix the *situs* of a debt at the domicile of the debtor."

Embree vs. Hanna, 5 Johns., 100.
Williams vs. Ingersoll, 89 N. Y., 508, 529.

This case was followed in *Carr vs. Corcoran (44 App. Div., 97);* and in *Simpson vs. Jersey City Contracting Co. (165 N. Y., 193)* it was decided that where certificates of stock of a foreign corporation belonging to a non-resident are in possession of a resident of New York as security for a debt, the interest of the owner and pledgor therein is a property right within the State which may be levied upon under a warrant of attachment against him in the manner prescribed by Subdivision 3 of Section 649 of the Code of Civil Procedure.

This doctrine has recently received recognition by this Court in *Chicago, Rock Island and Pacific Railway Company vs. Sturm, 174 U. S., 710,* where the question arose as to the right of an Iowa Court to reach by attachment a debt owing by a resident of that State to a resident of Kansas, in proceedings *in rem* instituted against the latter. The Supreme Court of Kansas held that it could not be done, because the situs of the debt was either with the owner thereof, or at his domicile, or where the debt was to be paid, and that the situs of the property in a debt can be changed only by the change of location of the creditor, who is the owner thereof, or with his consent. But that conclusion was reversed by this Court in an opinion by Mr. Justice McKenna, who made the following remarks, which are most pertinent to this case (pp. 714–716):

"The primary proposition is that the situs of a debt is at the domicile of a creditor, or, to state it negatively, it is not at the domicile of the debtor. The proposition is supported by some cases; it is opposed by others. Its error proceeds, as we conceive, from confounding

debt and credit, rights and remedies. The right of a creditor and the obligation of a debtor are correlative but different things, and the law, in adopting its remedies for or against either, must regard that difference. Of this there are many illustrations, and a proper and accurate attention to it avoids misunderstanding. This court said, by Mr. Justice GRAY, in *Wynan vs. Halstead, 109 U. S., 654, 656 : ' The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor.'* And this is not because of defective title in the creditor or in his administrator, but because the policy of the State of the debtor requires it to protect home creditors (*Wilkins vs. Ellett, 9 Wall., 740 ; 108 U. S., 256*). *Debts cannot be assets at the domicile of the debtor, if their locality is fixed at the domicile of the creditor* and if the policy of the State of the debtor can protect home creditors through administration proceedings, same policy can protect home creditors through attachment proceedings. For illustrations in matters of taxation see *Kirkland vs. Hotchkiss, 100 U. S., 491; Pullman's Car Co. vs. Pennsylvania, 141 U. S., 18 ; Savings and Loan Society vs. Multnomah County, 169 U. S., 421.* Our attachment laws had their origin in the Custom of London, Drake, § 1. Under it a debt was regarded as being where the debtor was, and questions of jurisdiction were settled on that regard. In *Andrews vs. Clarke, 1 Carthew, 25*, Lord Chief Justice HOLT summarily decided such a question and stated the practice under the custom of London. * * * The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all, or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due, and might be paid to a non-resident to the defeat of his creditors. *To do it he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there.* This is a legal necessity and considerations of situs are somewhat artificial. If not artificial whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives char-

acter to the action as one in the nature of a proceeding *in rem.*"

(b) Before this fund could be distributed at the place of the decedent's domicile, such distribution could only be made through the aid of the New York courts by means of administration there, of the debt owing to the decedent; and title was, therefore, derivable through such administration.

The rule is established by a uniform line of authorities that an executor or administrator appointed in one State cannot as such sue, or be sued, in his representative capacity in another.

Such are the decisions in New York, as is evidenced by the opinion of Judge FINCH in *Hopper vs. Hopper (125 N. Y., 402)*, where it was said:

"By the phrase 'foreign executor' the courts never mean the mere non-residence of the individual holding the office, but the foreign origin of the representative character. That is the sole product of the foreign law, and, depending upon it for existence, cannot pass beyond the jurisdiction of its origin. The individual may come here and acquire rights or incur liabilities which our tribunals will defend or enforce, but he can have no representative rights or liabilities since we recognize in him no representative character. The foreign executor may make a contract here which our courts will compell him to perform because it is his contract, but where it is the testator's only, he cannot sue or be sued upon it, since the right or the liability is purely representative and exists only by force of the official character, and so cannot pass beyond the jurisdiction which gave it. And thus it is not the residence of the executor out of the state which makes him a foreign executor, but the creation of his official character under and by force of a law foreign to our own."

To the same effect are numerous other New York cases, from among which we select the following:

Lawrence vs. Lawrence, 3 Barb., Ch. 74.
Matter of Webb, 11 Hun, 124.
Flandrow vs. Hammond, 13 App. Div., 325.
Johnson vs. Wallis, 112 N. Y., 230.

So in *Petersen vs. Chemical Bank, 32 N. Y., 22, 40, 42*, Chief-Judge DENIO said:

"A foreign executor or administrator (and one appointed under the laws of a sister state of the Union is foreign in the sense of the rule), cannot sue in his representative character in the courts of this state. * * * It is very clear in the first place, that neither an executor or administrator, appointed in a foreign political jurisdiction, can maintain a suit in his own name in our courts. Foreign laws have no inherent operation in this state; but it is not on this account solely or principally that we deny foreign representatives of this class a standing in our courts. * * * Accordingly, it is a necessary supplement to the doctrine that, if the law-making power of the state where the property happens to be situated, *or the debtor of the deceased reside*, to subserve its own policy, has engrafted qualifications or restrictions upon the rights of those who would succeed to the estate by the law of the domicile, they just take their rights subject to such restrictions. One of the most natural, as well as the most usual of these qualifications is that which is intended to secure the creditors of the deceased, residing in the country where the assets exist. It is in part to subserve this policy that the personal representatives are not permitted to prosecute the debtor or parties who withhold his effects in our courts."

It may be added that another of these qualifications is the requirement to pay a succession tax based on the amount of the debt, which is transferred through the medium of the courts of the state in which the debtor of the decedent resides.

See *Greves vs. Shaw, 173 Mass, 205; S. C., 53 N. E., Rep. 372*, and quotations from the opinion of Mr. Justice KNOWLTON, under Point III., subd. 3.

Such is also the law of Illinois, as is indicated by the decision in *Judy vs. Kelley (11 Ill., 211)*, where it was held that a grant of administration in one country confers on an administrator no title to the property of the intestate situate in another country; that he has no authority over, nor is he responsible for, any effects of the estate that may be beyond the jurisdiction appointing him; that such administrator, in his official

capacity, can neither sue nor be sued out of the country from which he derives his authority, and to which he is alone amenable, and that if he wishes to reach property or collect debts belonging to the estate in a foreign country, he must obtain letters of administration, and give such security, and become subject to such regulations as its laws may prescribe.

This decision was followed in *McGarvey vs. Darnall (134 Ill., 367; s. c. 25 N. E. Rep., 1005).*

This principle has received the sanction of this Court in a number of cases. Thus in *Johnson vs. Powers (139 U. S., 156)* a bill in equity was filed in the Circuit Court of the United States for the Northern District of New York by Johnson, a citizen of Michigan, in behalf of himself and of all other persons interested in the administration of the estate of one Stewart, late of Detroit, against several citizens of New York who were alleged to hold real estate in New York under conveyances made by Stewart in fraud of his creditors. The only evidence that the plaintiff was either administrator or a creditor was a duly certified copy of the record of the Probate Court of Michigan showing his appointment by that Court as administrator; the subsequent appointment by that Court of commissioners to receive and adjust claims of creditors, and the report of the commissioners allowing several claims, including one of the plaintiff.

It was held that as a foreign administrator the plaintiff could not maintain the action, and that the adjudication in the probate proceedings as to the plaintiff's status as a creditor was no evidence of debt in the suit brought by him in New York against third persons having assets of the deceased. Mr. Justice GRAY said:

"* * * The letters of administration granted to him in Michigan confer no power beyond the limits of that state, and cannot authorize him to maintain any suit in the courts, either state or national, held in any other state. *Stacy vs. Thrasher, 6 How., 44, 58; Noonan vs. Bradley, 9 Wall., 394.* * * * A judgment recovered against the administrator of a deceased

person in one state is no evidence of debt, in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased."

The case of *Stacy vs. Thrasher* is then cited, and referring to it, Mr. Justice GRAY proceeds:

"In answering the objection that to apply these principles to a judgment obtained in another state of the Union would be to deny it the faith and credit, and the effect, to which it was entitled by the Constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties, or their privies, or on the same subject matter when the proceeding was *in rem;* and that the parties to the judgments in question were not the same; neither were they privies, in blood, in law or by estate, and proceeded as follows: 'An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignities and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts.'"

To the same effect are the following cases:

Vaughan vs. Northrup, 15 Pet., 1.
Aspden vs. Nixon, 4 How., 467.
Reynolds vs. Stockton, 140 U. S., 254, 272.
Lawrence vs. Nelson, 143 U. S., 222.
Overby vs. Gordon, 177 U. S., 222.

Particular attention is directed to *Wyman vs. Halstead, 109 U. S., 654, 656,* and *Chicago, Rock Island, &c., Ry. vs. Sturm, 174 U. S., 714.*

These authorities are the more important in view of the opinion expressed in *Minot vs. Winthrop, 162 Mass., 113,* and *Frothingham vs. Shaw, 175 Mass., 59, 61,* that a tax of the kind now under consideration "has some

of the characteristics of a duty on the administration of the estates of deceased persons."

Such duties are levied in respect of the control which every government has over property within its jurisdiction, irrespective of the domicile of the decedent.

Laidley vs. Lord Advocate, 15 App. Cases, 468, 483.
Hanson on Death Duties, 2, 63.

II.

If the funds deposited with the Trust Company and Cuyler, Morgan & Co. are to be regarded as money of the decedent within the State, in accordance with the decision in the Houdayer case, then no question as to the validity of the tax can arise, since it must be conceded that it was within the power of the N. Y. Legislature to place a succession tax upon the tangible property within the State of a non-resident decedent.

Callahan vs. Woodbridge, 171 Mass., 595.
In re Romaine, 127 N. Y., 80.
Matter of Whiting, 150 N. Y., 27.
Alvany vs. Powell, 2 Jones Eq., 51.
Cases cited under Point III.

If this proposition is sound, as it is believed to be, it is unnecessary to pursue the argument further. But inasmuch as the plaintiff in error has persisted in treating the deposits as a debt, and not as money, we will proceed to consider the case in that aspect.

III.

Assuming then that the Legislature of New York intended to bring within its taxing power deposits made with residents of New York by non-residents for the purposes of assessing a succession tax upon the estate of the latter, as declared in the Houdayer case, the practical question arises as to whether or not it is within the power of such Legislature to create a situs for such property within the sovereignty of New York for purposes of taxation. We confidently assert that it is.

It is doubtless true that under the legal fiction embodied in the maxim *mobilia personam sequuntur* personal estate is deemed to have no *situs* separate from the person or residence of the owner, and it is on the basis of this maxim that it is claimed that debts and choses in action can have no *situs* other than that of the creditor.

This fiction is not, however, superior to the legislative power and has been so frequently disregarded in legislation that it has become practically exploded This is illustrated by the attachment laws, to which reference has already been made. and is demonstrated by a long line of decisions in various jurisdictions affecting the subject of taxation.

1. New York Decisions.

So long ago as 1861 Chief Judge Comstock, said in *People ex rel. Hoyt vs. Commissioners of Taxes (23 N. Y., 224) :*

" It is said, however, that personal estate by a fiction of law has no *situs* away from the person or residence of the owner, and is always deemed to be pres-

ent with him at the place of his domicile. The right to tax the relator's property situated in New Orleans and New Jersey rests upon the universal application of this fiction ; and it is accordingly insisted upon as an absolute rule or principle of law which, to all intents and purposes, transfers the property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The necessary consequence is, that goods and chattels actually within this state are not here in any legal sense, or for any legal purpose, if the owner resides abroad. They cannot be taxed here because they are with the owner who is a citizen or subject of some foreign state. On the same ground, if we were to. have harmonious rules of law, we ought to relinquish the administration of the effects of a person resident and dying abroad, although the claims of domestic creditors may require such administration. So, in the case of the bankruptcy of such a person, we should at once send abroad his effects, and cannot consistently retain them to satisfy the claims of our own citizens. Again, we ought not to have laws for attaching the personal estate of non-residents, because such laws necessarily assume that it has a *situs* entirely distinct from the owner's domicile. Yet we do in certain cases administer upon goods and chattels of a foreign decedent ; we refuse to give up the effects of a bankrupt until creditors here are paid ; and we have laws of attachment against the effects of non-resident debtors. These, and other illustrations which might be mentioned, demonstrate that the fiction or maxim *mobilia personam sequuntur* is by no means of universal application. Like other fictions, it has its special uses. * * * Accordingly there seems to be no place for the fiction of which we are speaking in a well adjusted system of taxation."

In *People ex rel. Westbrook vs. Board of Trustees of the Village of Ogdensburgh* (*48 N. Y., 390*) it was held that where at the time of the making out of an assessment roll the agent of a non-resident has moneys belonging to his principal on deposit in bank, it is liable to be assessed and taxed ; and that money due upon a contract for the sale of lands, where such contract belongs to a non-resident, is likewise assessable.

Speaking of these obligations, EARL, C., said:

"And while, for some purposes in the law, by legal fiction, it follows the person of the creditor and exists where he may be, yet it has been settled that for the purpose of taxation this legal fiction does not, to the full extent, apply, and that such property belonging to a non-resident creditor may be taxed in the place where the obligations are held by his agent."

In *Matter of Romaine, 127 N. Y., 80. 86,* Judge VANN said:

"The fiction of law that personal estate has no *situs* away from the person or residence of its owner is done away with, to a limited extent and for a specified purpose, and the truth is substituted in its stead as the rule of action. That the legislature had the power to do this can hardly be questioned (Matter of McPherson, 104 N. Y., 306). As was said by Judge STORY when writing upon this subject: 'A nation within whose territory any personal property is actually situated has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there' Conflict of Laws, §550). In People *ex rel.* Hoyt v. Commissioners of Taxes (23 N. Y., 224, 228), Judge COMSTOCK quotes with approval the foregoing extract, and adds: 'I can think of no more just and appropriate exercise of the sovereignty of a state or nation over property situated within it and protected by its laws, than to compel it to contribute toward the maintenance of government and law. Accordingly there seems to be no place for the fiction of which we are speaking in a well adjusted system of taxation.'"

In *People ex rel. Jefferson vs. Smith 88 N. Y., 576, 581,* Judge EARL said:

"That choses in action can have a *situs* away from the domicile of the owner for the purpose of taxation and for other purposes, is frequently manifested in the statutes of this state. * * * The debts here mentioned are choses in action and, according to the contention of these assessors, could have an existence only at the domicile of the creditor, and, whether he lived in this country or in Europe, could make no difference with the legal fiction; and yet that it was

the legislative intent that such debts for the purpose of taxation can have an existence away from the domicile of the owner cannot be questioned. * * * From these citations I think it may safely be said that the legal fiction that choses in action always attend the owner and have a legal existence only at the place of his domicile has been frequently ignored by the legislature in framing our system of taxation, and that it cannot be resorted to as a safe guide in the construction of the provision of the statute now under consideration."

Accordingly it was held that where a resident of this State was assessed for personal property which consisted of mortgage securities in the hands of his agents residing in other States, who retained the custody of the securities from the time they were taken and received, and reinvested the interest paid thereon, and upon payment of any security, under authority given them by their principal, discharged such security, they were not personal estate "within this state" within the meaning of the New York Statute in relation to taxation.

The case of *Kirkland vs. Hotchkiss (100 U. S., 491)*, was reviewed, and speaking of it Judge EARL said:

"In the United States Supreme Court, the only question considered, was whether the federal constitution prohibits a state from taxing in the hands of one of its resident citizens a debt held by him against a resident of another state, and evidence by the bond of the debtor secured by deed of trust or mortgage upon real estate situated in the state in which the debtor resides, and it was held that it did not. It was also held in very broad terms, that for the purpose of taxation, a debt has its *situs* at the residence of the creditor and may be there taxed. The doctrine as thus announced was sufficiently accurate for the decision of that case, and there is nothing in the language of the opinion from which it can be inferred that the court meant to decide that a debt must always be taxed at the domicile of the creditor and not elsewhere. It would have been a more accurate statement of the doctrine to say that a debt *may* have its *situs* at the residence of the creditor and *may* be there taxed, and

the doctrine as thus stated is sufficient for the decision of that case."

Similar comments were made upon *Kirkland vs. Hotchkiss* by Mr. Justice GRAY in Savings Society vs. Multnomah County, 169 U. S., 421, as is indicated by the quotation which appears below.

In *Matter of Whiting* (*150 N. Y., 30*), Judge VANN said :

" When the design of the legislature is to tax the transfer of everything that it has power to tax, there is no insistency in taxing in one form if another is not available. Indeed, perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape that can be owned or transferred. Thus the legislature intended, as I think, to repeal the maxim *mobilia personam sequuntur*, so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this state. I think this intention plainly appears from the history of legislation upon the subject, the decisions of the courts, some of them in effect repealed, and from the sweeping language of the statute, which subjects everything that can be owned in this state to a succession tax, except so far as expressly exempted. The legislature possessed and exercised the power to employ the maxim when necessary, and to disregard it when necessary to attain that object."

2. DECISIONS OF THIS COURT.

In *Hervey vs. R. I. Locomotive Works* (*93 U. S., 664, 671*) Mr. Justice DAVIS said :

" It was decided by this court, in *Greeen v. Van Buskirk, 5 Wall., 307 ; 7 Id., 139*, that the liability of property to be sold under legal process, issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. *He has no absolute right to have*

the transfer of property, lawful in that jurisdiction, respected in the courts of the state where it is found, and it is only on a principal of comity that it is ever allowed. But this principle yields when the laws and policy of the latter state conflict with those of the former."

To the same effect are

Warner vs. Jaffray, 96 N. Y., 254, 255.
Walworth vs. Harris, 129 U. S., 365.
Security Trust Co. vs. Dodd, 173 U. S., 628.

In *Pullman's Car Co. vs. Pennsylvania* (*141 U. S., 18, 22*), Mr. Justice GRAY said:

" No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middld Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in the amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. *Green v. VanBuskirk, 5 Wall., 139; Harvey v. R. I. Locomotive Works, 93 U. S., 664; Harkness v. Russell, 118 U. S., 663, 679; Walworth v. Harris. 129 U. S., 335; Story on Conflict of Laws, § 550; Wharton on Conflict of Laws, §§ 297–311.* * * *

" *For the purpose of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax. Lane County v. Oregon, 7 Wall., 71, 77; Railroad Co. v. Pennsylvania, 15 Wall., 300, 323, 324, 328; Railroad Co. v. Peniston, 18 Wall., 5, 29; Tappan v. Merchants' Bank, 19 Wall., 490, 499; State Railroad Tax Cases, 92 U. S., 575, 607, 608; Brown v. Houston, 114 U. S.,*

622; Coe v. Errol, 116 U. S., 517, 524; Marye v. Baltimore & Ohio R. R., 127 U. S., 118, 123."

In *Savings Society vs. Multnomah County (169 U. S., 421)* the Legislature of Oregon taxed mortgages of lands in the State to the mortgagees in the county where the land was situated. It was held that the act was not unconstitutional as applied to mortgages owned by citizens of other States and in their possession outside of the State of Oregon.

By the law of Oregon a mortgage of real property does not convey the legal title to the mo tgagee, but creates only a lien or incumbrance as security for the mortgage debt; and the right of possession, as well as the legal title, remains in the mortgagor, both before and after condition broken, until foreclosure (p. 426).

Mr. Justice GRAY, after making this statement, said:

"The authority of every state to tax all property, real and personal, within its jurisdiction, is unquestionable (*McCulloch v. Maryland, 4 Wheat., 316, 429*). Personal property, as this court has declared again and again, may be taxed, either at the domicile of its owner or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the state which imposes the tax. A state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purpose of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicile; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property at its *situs*. * * * In *Kirkland v. Hotchkiss, 42 Conn., 426*, affirmed by this court in *100 U. S., 491*, the point adjudged was that debts to persons residing in one state, secured by mortgage of land in another state, might, for the purposes of taxation, be regarded as situated at the domicile of the creditor. But the question whether the mortgage could be taxed there only, was not involved

in the case, and was not decided, either by the Supreme Court of Connecticut or by this court. * * * The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing which is the evidence of the debt secured by the mortgage ; and, with equal distinctness provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest legal or equitable, may be taxed to its owner (whether resident or non-resident) in the state where the land is situated, without contravening any provision of the Constitution of the United States."

Chicago, Rock Island & Pacific Ry. Co. vs. Stearm, 174 U. S., 714, considered at length under Point I., subd. IV., 3*a*, is very much in point.

In *New Orleans vs. Stempel* (*175 U. S., 309*), the constitutionality of a Louisiana statute, as interpreted by the Supreme Court of that State, was involved. By the terms of the act it is made the duty of the tax assessors throughout the State to place upon the assessment list all property subject to taxation. It was declared :

" This shall apply with equal force to any person or " persons representing in this state business interests, " that may claim a domicile elsewhere, the intent and " purpose being that no non-resident, either by him- " self or through any agent, shall transact business here " without paying to the state a corresponding tax with " that exacted of its own citizens ; and all bills receiv- " able, obligations or *credits* arising from the business " done in this state are hereby declared assessable " within this state and at the business domicile of said " non-resident, his agent or representative."

Defendant, who was domiciled in the City of New York, was the owner of credits which were evidenced

by notes secured by mortgages on real estate in New Orleans. These notes and mortgages were in the City of New Orleans, in the possession of an agent who collected the interest and principal as they became due and deposited them in the bank in New Orleans to her credit. It was held that such taxation did not violate the Federal Constitution.

The action was brought to restrain the collection of taxes levied on personal property, which the appellee claimed was exempt from taxation. She was a resident of New York. The assessment was of $15,000 "money in possession, on deposit, or in hand," and of $800,000 "money loaned on interest, all credits and all bills receivable for money loaned or advanced, or for goods sold, and all credits of any and every description. The principal contention of the appellee was that the situs of the loans and credits was in New York, her domicile, and therefore being loans and credits without the State of Louisiana were not subject to taxation therein. The question to be decided was stated as follows:

"Under the circumstances disclosed by the testimoney, were the money and credits subject to taxation? * * * The question, therefore, is distinctly presented whether, because the minors were domiciled in New York, the moneys so deposited in a bank within the limits of the State of Louisiana, and the debts secured by mortgages as treated and held as above described were free from taxation in the latter State." * * *

Mr. Justice BREWER, after quoting the statute, calls attention to a number of cases decided by the Supreme Court of Louisiana in which the act had been construed, among others *Clason vs. New Orleans*, (*46 L. A., 1*), and then proceeds:

"This decision was, however, qualified in *Bluefield Banana Company vs. Board of Assessors. 49 La. Ann. 43*, the court there saying that the decision rested upon the special facts of that case; that there was really no general deposit, but that the local bank was simply a medium through which the funds of the nonresident kept at the place of his residence were drawn

against for the purpose of making payments in Louisana, and in this latter case it was held that, where a non-resident had an agent in New Orleans who disposed of the property of his principal as it was forwarded in the course of business and deposited the proceeds thereof in bank to the credit of his principal, the sum thus deposited was subject to taxation. This is the language of the court after its reference to the *Clason case* (*supra*, page 48).

"The case is different here. The foreign corporation had an agent here, where it received and where it sold fruit and received the price for the same. Part of the proceeds were withheld in the hands of the agents for purposes incidental to the prosecution of its business, and part deposited to the credit of the company, subject to the check of its local agent, also for the prosecution of its business here, and for such other purposes as the company might direct it to be applied to. The company transacted business in New Orleans precisely as did resident business men and firms. It received all the advantages to be derived from the state and city governments which residents received, and we see no reason why it should not be taxed, as claimed in this proceeding, unless there be insuperable legal objections in the way. We find a statute of the state, which by its terms brings them under the operation of state and city taxation, and we are bound to give effect to its provisions unless they be in derogation of the Constitution. The unconstitutionality of the act is not pleaded, and we, of ourselves, see no unconstitutional features in it. The rule *mobilia sequuntur personam* is a fiction of the law, not resting of itself upon any constitutional foundation, and which gives way before express laws, destroying it in any given case where constitutional requirements themselves do not stand in the way.

"This was reaffirmed in *Parker, Tax Collector v. Strauss & Co., 49 La. Ann., 1173*, in which the court says (page 1175):

"'The revenue act, in entire accordance with the conceded extent of the taxing power, taxes the movable property of a foreigner. We cannot hold that cash thus liable to taxation is exempted, because for convenience it is deposited in bank and checked on by the owner. It would be a strain to apply to the deposited cash the exemption from taxation accorded to debts in their ordinary significance, due to the foreign creditor.' * * *

"From this review of the decisions of the Supreme Court of the State it is obvious that moneys, such as those referred to, collected as interest and principal of notes, mortgages and other securities kept within the State and deposited in one of the banks of the State for use or reinvestment, are taxable under the act of 1890. They are property arising from business done in the State; they are tangible property when received by the agent of the plaintiffs, and as such subject to taxation, and their taxability was not, as the court holds, lost by their mere deposit in a bank. It is true that when deposited the moneys became the property of the bank, and for most purposes the relation of debtor and creditor arose between the bank and the depositor; yet as evidently the moneys were to be kept in the State for reinvestment or other use they remained still subject to taxation, according to the decision in *49 La. Ann., 43*. With regard to the notes and mortgages, it may be conceded that there is no express decision of the Supreme Court to the effect that they were taxable under the law of 1890, yet the reasoning of that court in several cases and its declarations, although perhaps only dicta, show that clearly in its judgment they had a local situs within the State, and were by the statute of 1890 subject to taxation.

"With reference to the decisions of this Court it may be said that there has never been any denial of the power of a state to tax securities situated as these are, while there have been frequent recognitions of its power to separate, for purposes of taxation, the situs of personal property from the domicile of the owner.

"This matter of situs may be regarded in another aspect. In the absence of statute, bills and notes are treated as choses in action and are not subject to levy and sale on execution, but by the statutes of many states they are made so subject to seizure and sale, as any tangible personal property. * * *

"It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; are subject to levy and sale on execution, and to seizure and delivery upon replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if

found within its limits they shall be subject to taxation."

In *Bristol vs. Washington Co.* (*177 U. S., 133*) it was held that the personal property of a citizen or a resident of one State invested in bonds and mortgages in another State, is subject to taxation in the latter State. Chief Justice FULLER quoted from the decision of the Supreme Court of Minnesota in *Re Jefferson* (*23 Minn., 215*) as follows:

"It is to be taken, therefore, as the intent of the statute, that credits, to whomsoever owning, are taxable here if they can be regarded as personal property *in this state:* that is, situated in this State. To justify the imposition of tax by any State, it must have jurisdiction over the person taxed, or over the property taxed. As Jefferson was not a resident of this State, there was no jurisdiction over him. But if the property on account of which these taxes were unpaid was within this State, the State had jurisdiction to impose them as it might impose a tax upon tangible personal property permanently situated here, and to enforce the taxes against the property. The authorities which we cite in support of the proposition that the credits taxed had a *situs* here, fully sustain this.

"For many purposes the domicil of the owner is deemed the *situs* of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual *situs* of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. * * *

"The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now, here was property within this State, not for a mere temporary purpose, but as permanently as though the owner resided here. It was employed here as a business by the one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of this State. It had to rely on those laws for the force and validity of the contracts on the loans, and the preservation and enforcement of the securities. The laws of New York never operated on it. If credits can ever

have an actual *situs* other than the domicil of the owner, can ever be regarded as property within any other State, and as under obligation to contribute to its support in consideration of being under its protection, it must be so in this case."

Chief Justice FULLER proceeds:

"Nevertheless the business of loaning money through the agency in Minnesota was continued during all these years just as it had been carried on before, and we agree with the Circuit Court that the fact that the notes were sent to Mrs. Bristol in New York, and the fact of the revocation of the power of attorney, did not exempt these investments from taxation under the statutes as expounded in the decision to which we have referred. And we are unable to perceive that any rights secured by the Federal Constitution were infringed by the statutes so far as the *situs* of these loans and mortgages was concerned."

The power of a state to separate for purposes of taxation the *situs* of personal property from the domicile of the owner was likewise recognized.

In *Eidman vs. Martinez, 184 U. S., 578*, which arose under the 29th section of the War Tax Law of June 30, 1898, which differed materially in its provisions from the act now under consideration, the power of a State to tax the intangible property, including credits, of a non-resident was considered, Mr. Justice BROWN saying:

"The ancient maxim of the law, *mobilia sequuntur personam*, was the outcome of conditions which have largely ceased to exist, and of an age when personal property consisted principally of articles appertaining, as the name indicates, to the person of the owner, such as gold and silver, jewels, apparel, and less immediately to horses, cattle and other animals, and to the products of the farm and the shop. As this property was, in primitive times, usually kept under the personal supervision of the owner, and was often carried about by him on his journeys, (as it often still is in Oriental countries,) the principle became incorporated in the law that its locality was determined by the domicil of

of the owner, and that his rights with respect to such property were fixed by the law of that domicil.

"While the enormous increase in the amount and variety of personal property during the past century has necessitated certain limitations of the maxim, particularly in matters of taxation, it is by no means obsolete. It is still the law that personal property is sold, transmitted, bequeathed by will, and is descendible by inheritance, according to the law of the domicil and not by that of its *situs*. *Cross v. United States Trust Co.* 131 N. Y., 330; *Ennis v. Smith*, 14 How., 400, 424; *Dammert v. Osborn*, 141 N. Y., 564. In matters of taxation, however, and of subjecting the personal property of non-residents to the claims of local creditors of the owner, serious encroachments have been made upon the ancient maxim, and a rule has grown up in modern times that legislatures may deal with the personal as well as with the real property of non-residents within their jurisdiction; and that such property, while enjoying the protection and benefits of the local law, may be taxed for the expenses of the local government. These doctrines have found expression in a large number of cases in this court. *Green v. Van Buskirk*, 5 Wall, 307; *S. C.*, 7 Wall., 139; *Hervey v. Rhode Island Locomotive Works*, 93 U. S., 664; *Walworth v. Harris*, 129 U. S., 355; *Security Trust Company v. Dodd*, 173 U. S., 624, and cases there cited.

"Recent cases in this court have affirmed very broadly the right of the legislature to tax the local property of non-residents, and particularly of corporations who are permitted by comity to do business within the State (*The Delaware Railroad Tax*, 18 Wall., 206; *Erie Railway Co. v. Pennsylvania*, 21 Wall., 492; *Western Union Tel. Co. v. Massachusetts*, 125 U. S., 530; *Marye v. Baltimore & Ohio Railroad*, 127 U. S., 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S., 18; *Adams Express Co. v. Ohio*, 166 U. S., 185). The same principle has been applied not only to tangible property, but to credits and effects (*Tappan v Merchants' National Bank*, 19 Wall., 490; *Savings Society vs. Multnomah County*, 169 U. S., 421; *New Orleans v. Stempel*, 175 U. S., 309; *Bristol v. Washington County*, 177 U. S., 133).

"The question in each case is not of the power of the legislature to tax the personal property of non-residents, both tangible and intangible, since that is well established both in England and America

(*Mager v. Grima*, 8 How., 480), but of its intent to do so by the particular act in question.

* * * * * *

"Conceding it to be within the power of Congress to impose an inheritance tax upon property in this country, no matter where owned or transmitted, it has not done so in this case."

In *Moore vs. Ruckgaber, 184 U. S., 593*, which arose under the same act, the *Romaine Case, 127 N. Y., 80*, above referred to, was cited and followed.

(3) DECISIONS IN OTHER JURISDICTIONS.

In *Greves vs. Shaw, 173 Mass, 205; s. c. 53 N. E. Rep., 372*, it was held under the Statutes 1891, Chapter 425, Section 1, imposing a succession tax on all property within the commonwealth, whether tangible or intangible, and whether belonging to residents or not, stock in corporations, organized under the laws of the commonwealth, and of national banks located in the State, is so taxable, although the certificates were without the commonwealth at the testator's death and were transferred by the executor, under the authority of his appointment in the State of New York, before his appointment in the commonwealth. Mr. Justice KNOWLTON said:

"The only ground on which it is strongly contended that the stocks in question are exempt from taxation is that they were transferred by the executor, under the authority of his appointment in the state of New York, before he was appointed in this commonwealth. It is argued by the appellant that, although a foreign executor or administrator cannot be recognized by the courts of the commonwealth in any suit or proceeding to collect assets under his foreign appointment, he has a title, by virtue of it, such that payments and deliveries of property in this commonwealth may properly be made to him * * * This doctrine is subject, however, to the rule that if, in the interests of local creditors, ancillary administration is taken out, the title of the foreign administrator to the property then in the state is subordinate to the title of the ancillary administrator, who specially represents local rights under the authority of local laws.

"It is contended that if, under his foreign appointment, the original executor obtains possession of property in this commonwealth, it should be treated, under this statute, as if it had never been within our jurisdiction, and be free from taxation, inasmuch as it does not come into the hands of the local administrator or executor. But we are of opinion that this contention is not well founded. The provisions of the statute subjecting property described in it to taxation are absolute. The statute assumes that this property will be administered by an executor or administrator appointed in this commonwealth, and makes elaborate provisions in regard to the duties of executors and administrators, and of probate courts, in relation to it. St. 1891, c. 425, Sec. 4, 5, *et seq.* In *Callahan v. Woodbridge*, 171 Mass., 595; 51 N. E., 176, it was pointed out that the 'probate court having jurisdiction of the settlement of the estate of the deceased,' within the meaning of section 14 of this statute, is the probate court in which ancillary administration is taken out, if the testator or intestate is a non-resident. It cannot be supposed that the legislature intended that the question whether the succession to property of non-residents should be taxed or not should depend, in each case, upon the ability or inability of the foreign executor to obtain possession of it in this commonwealth without a sui It must be held that the provisions of the law imposing the tax are to be carried out, and that the right and title of the foreign executor or administrator are subject to the prior right of the commonwealth to have property so administered by officers of its courts as to produce the tax for which it is liable."

The language of Chief Justice DENIO, in *Petersen vs. Chemical Bank, 32 N. Y.*, cited under Point I., subd. IV., 3*a*, is then quoted and applied.

In re Small's Estate, 151 Pa. St., 1; s. c. 25 *Atlantic Rep.*, 23, the interest of a member of a limited partnership organized under the laws of Pennsylvania, and whose business and property were within that State, was held to be personal property situate within the State, and subject to the collateral inheritance tax law, although the decedent was a non-resident of the State. The language of Chief Judge COMSTOCK in *People ex*

rel. Hoyt vs. Commissioners, 23 N. Y., 224, 228, above cited, was applied.

In Kingman County Commissioners vs. Leonard, 57 Kans., 531; s. c. *34 L. R. A., 810,* the question arose as to the right to assess and tax judgments rendered by the courts of Kansas in favor of and owned by citizens of other States. While the statute was construed as not authorizing such taxation, the right of the Legislature to create such a tax was recognized. After referring to the maxim *mobilia personam sequuntur,* Judge ALLEN said:

"To questions of taxation the maxim has very little application. Every sovereignty asserts the right to levy taxes on persons and property within its protection, and the ground on which all taxation is justified is that it is a burden necessarily imposed by the sovereignty in order to enable it to perform its duty in protecting persons and property (1 *Desty Taxn.,* 59; *Cooley, Taxn.,* 19 *et seq.; Story, Confl.,* 1, 543, note A, and cases cited). We think it now quite well settled that choses in action belonging to a non-resident, in the hands of a managing agent within the state, are taxable (*New Albany v. Meekin,* 56 *Am. Dec.,* 522, note page 530, and cases cited therein; 1 *Desty, Taxn.* 64; *Finch v. New York County,* 19 *Neb.* 50, 56 *Am. Rep.* 741). The power to tax residents of the state on credits due from citizens of other states is often upheld (*Kirtland v. Hotchkiss,* 42 Conn., 426, 19 *Am. Rep.* 546). And this even where it results in duplicate taxation (*Dyer v. Osborne,* 11 R. I. 321, 23 *Am. Rep.* 460; note to *People v. Worthington,* 74 *Am. Dec.* 95, and cases cited). The cases upholding the power to tax promissory notes and other written securities held within the state, though owned by a non-resident, sometimes lays stress on the fact that the securities are, in a certain sense, property, and are subject to seizure for debt, and that a title may be made to the intangible debt by delivery of the written evidence of it.

"We perceive no valid objection to the power of the legislature to tax all judgments by domestic courts, and remaining unsatisfied, whether owned by citizens of this state, or other states, or foreign countries, provided the rate of taxation be the same as that imposed on other forms of property belonging to citizens of this state. The question here, however, is whether the

legislature has expressed a purpose to tax judgments in favor of a citizen of another state, rather than as to the power to do so."

In *Allen vs. National State Bank, 92 Md., 509.* s. c. *52 L. R. A., 760,* the right to right to tax mortgages owned by a non-resident was recognized. Mr. Justice FOWLER said:

"It is one of the axioms of the law of taxation that the State has the right to tax all persons and all, property of every kind within its jurisdiction * * * But it is contended that the interest of the mortgagee is in the nature of a chose in action and that according to well settled rule, here and elsewhere, such property must be assessed and taxed to the owner where he has his domicil.

* * * * * *

Conceding for the present that the interest of the mortgagee is in the nature of a chose in action, the general rule that its situs for taxation is the residence of the owner is a mere fiction of law and yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. And whenever the legislative intent is manifested that this legal fiction should not operate."

The decisions in *Savings & Loan Society vs. Multnomah County,* (*supra*), and *Bristol vs. Washington County,* (*supra*), were exhaustively cited and followed.

In Illinois the right to impose a transfer tax under conditions like those existing in the present case, is recognized by express legislative enactment.

Section 9 of Chapter 301 of the Laws of 1895, regulating taxes on inheritances which appears at page 25 of the Record, reads as follows:

"§ 9. Whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this State standing in the name of a decedent, or in trust for a decedent, which shall be liable to the said tax, such tax shall be paid to the treasury, or treasurer of the proper county on the transfer thereof; otherwise, the corporation forming such transfer shall become liable to pay such taxes; provided that such cor-

poration has knowledge before such transfer that said stocks or loans are liable to such taxes."

From these decisions the rule is deducible that it is within the power of the State to which resort must be had for the purpose of reducing to possession property of a decedent, whether a resident or a non-resident, by those succeeding to his ownership, to impose such restrictions and conditions on the rights of succession as it may see fit to create, whether the property to be reduced to possession is tangible or intangible, real or personal, and even though it may be a mere credit.

This conclusion follows as a corollary to the propositions that the right to succeed to property within the limits of any sovereignty must depend upon the consent of the sovereign; that upon the death of the owner of the property there is no natural or inherent right on the part of his heirs, next of kin or collateral relatives to take his property; and that his right to dispose of it by will is likewise limited by the consent of the State in which he has property. The State, in the case of money deposited in bank, would unquestionably have the right to prohibit the enforcement of the obligation of the bank in favor of the personal representatives of the decedent appointed in another jurisdiction, and would be warranted in appropriating the entire amount of the deposit for its purposes. Since the greater includes the less, it necessarily follows that the sovereign to whom resort must be had for authority to reduce the deposit to possession may impose a tax upon the right to reduce such property to possession, in lieu of absorbing the entire deposit.

As long ago as in 1850 this principle was recognized. In *Mager vs. Grima (8 How. U. S., 490, 493)*, where, under the law of Louisiana, every alien taking as heir, legatee or donee the whole or any part of the succession of the person deceased was required to pay a tax to the State of ten per cent. of the value thereof. The

constitutionality of this legislation was upheld, Chief-Justice TANEY saying:

"Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses of regulating the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the states of this Union at this day real property devised to an alien is liable to escheat. And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent. for the use of the state.

"In some of the states, laws have been passed at different times imposing a tax similar to the one now in question, upon its own citizens as well as foreigners; and the constitutionality of these laws has never been questioned. And if a state may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens."

In *United States vs. Perkins, 163 U. S., 625*, Mr. Justice BROWN said:

"Though the general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to the public good. In this view the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; the decla-

ration that in the exercise of that power he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to conditions that the state has a right to impose."

See, also, State vs. Dalrymple, 70 Md., 294; Plummer vs. Coler, 178 U. S., 115, 130, 137; Magoun vs. Ill. Trust & Sav. Bank, 170 U. S., 288.

The case principally relied on by the plaintiff in error is *State Tax on Foreign Held Bonds, 15 Wall., 300.* There, after bonds had been issued by a railroad company and transferred to and held by a non-resident of the State of Pennsylvania, in which the company was incorporated, a law was passed which imposed a tax of five per cent. on the amount of interest due on bonds of the company, payable out of the State to non-residents. It was held that this law was unconstitutional, since it interfered between the company and its bondholders, and, under the guise of levying a tax, impaired the obligation of the contract between the parties.

It will be noted that in that case the bonds sought to be taxed were in the hands of the holders outside of the boundaries of Pennsylvania; that such holders were non-residents of the State, and that the law imposing the tax was passed after the bonds had been issued.

It was not intended by this decision to restrict the power of the State on the subject of taxation, or to lay down a rule forbidding the Legislature from creating a situs for property for purposes of taxation. This clearly appears from the opinion of Mr. Justice FIELD, who says:

"Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction. Corporations may be taxed, like natural persons, upon their property and business, but debts owing by corporations, like debts owing by individuals, are not

property of the debtors in any sense. They are obligations of the debtors and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations belongs to the creditors to whom they are payable, and follows their domicil wherever that may be. Their debts can be in no locality separate from the parties to whom they are due. * * * The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state they are property beyond the jurisdiction of the state. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholders is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of the contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulation of the contract and prevents their legal enforcement."

It is further to be noted that in the case cited the question was one of direct taxation on the property of a non-resident, while in the present case there is no attempt to tax property but merely the right of succession, which is governed by different principles. It is likewise to be noted that in this case Mr. Blackstone deposited his money after the passage of the Transfer Tax Act, and after it had been construed by the Court of Appeals in the Houdayer case to include within its terms deposits of such a character as those which he made.

The case now under consideration has been overruled in part in *Savings Society vs. Multnomah County, 169 U. S.. 428, 429,* and was qualified in *New Orleans vs. Stempel, 175 U. S., 320,* where, after quoting from the opinion of Mr. Justice FIELD, in *15 Wall.*, the sentence:

"But other personal property, consisting of bonds, mortgages and debts generally, has no situs independent of the domicil of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt are not separated from the possession of the owners,"

Mr. Justice BREWER says:

"This last sentence, properly construed, is not to be taken as a denial of the power of the legislature to establish an individual situs for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicil of the owner—a declaration which the legislature has no power to disturb when *in fact* they are in his possession."

Having now considered the basic proposition on which the plaintiff in error founds her contention that the tax under review is unconstitutional, and having shown that it is without foundation, it will be unnecessary to indulge in elaborate argument with respect to the several specific grounds on which the claim of unconstitutionality is based.

IV.

The statute on which the tax is predicated does not impair the obligation of the contract.

Mr. Blackstone brought his money into New York State and accepted the protection of its laws in March, 1899, and left his money there until May 26th, 1900. The transfer tax now sought to be collected was imposed by a statute which originated in 1885, and which in 1896 had been construed by the Court of Appeals to apply to deposits such as were made by him, hence his contract was made subsequent to the statute imposing the transfer tax, and must be deemed to have been made with reference to it, especially in view of the age and physical condition of Mr. Blackstone. There can have been no impairment of any contract.

Is is unnecessary to do more than to refer to the discussion under the preceding point with regard to this feature of the case and to cite *Pinney vs. Nelson, 183 U. S., 144, 147*, where Mr. Justice BREWER, said:

"With reference to the contention that the law of California impairs the obligation of the contract with the stockholders, it is enough to say that that law, both constitutional and statutory, was enacted long before the incorporation of the Los Angeles Iron & Steel Co., and that therefore Section 10 of Article I. of the Federal Constitution has no application. 'It is equally clear that the law of the state to which the Constitution refers in that clause must be one enacted after the making of the contract, the obligation of which is claimed to be impaired.'

"*Lehigh Water Co. v. Easton, 121 U. S., 388, 391.*

"See, also,

"*Central Land Co. v. Leadley, 159 U. S., 103, 111.*

"*McCullough v. Virginia, 172 U. S., 102, 116.*"

V.

The tax is not rendered unconstitutional because there is a possibility that the decedent's estate may be subjected to double taxation.

There is no provision of the Federal Constitution governing State taxation, which forbids unequal or double taxation.

In *Davidson vs. New Orleans* (*96 U. S., 97, 106*), this was expressly declared, Mr. Justice MILLER saying :

" It is said that the plaintiff's property had previously been assessed for the same purpose and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the states. If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract."

Dyer vs. Osborne, 11 R. I., 321 ; S. C., *23 Am. Rep., 460*, is to the same effect.

This doctrine was applied to an inheritance tax in *Frothingham vs. Shaw, 175 Mass., 59, 61.*

In *People vs. The Home Insurance Co. (92 N. Y., 347)*, Chief Judge RUGER said :

" In the consideration of the effect and meaning of laws imposing taxes it would undoubtedly be the duty of the court to so construe them, if possible, as to avoid unequal and double taxation, but in determining the question of legislative power we are precluded from entertaining such considerations and must be governed by the constitutional authority conferred by the legislative body. In performing the duty of levying taxes for the support of government, state legislatures may, in the exercise of their undoubted power, impose double taxes or lay burdens beyond the finan-

cial capacity of the classes taxed, and however impolitic or unwise such a course would be, the courts have no right to interfere with the exercise of the legislative discretion. Such questions properly belong to the legislative branch of the government, whose exclusive duty it is to apportion and impose the taxes required for the use of the government."

This case was affirmed by this Court in *119 U. S., 129,*

In *Coe vs. Errol, 116 U. S., 524,* Mr. Justice BRADLEY said:

"We take it to be a point settled beyond all contradiction, or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also."

The War Tax on inheritances was sustained in *Knowlton vs. Moore (178 U. S., 53),* although the State had likewise imposed a tax on the same inheritance, although it was recognized that the transmission of property by will or intestacy is within the exclusive province of State and not Federal regulation.

There is no question of interpretation before this Court. That was passed upon by the Court of Appeals. The constitutionality of the act is not affected by the circumstance that the State of Illinois has likewise imposed an inheritance tax based on the moneys now under consideration.

Moreover, the Inheritance Tax Law of Illinois gives to the plaintiff in error a remedy which will enable her to receive from that State the tax erroneously paid by her on the assumption that the succession to the

money deposited in the New York banks was taxable in Illinois.

After providing for the payment by a foreign executor or administrator of a transfer tax on stocks or loans in the State of Illinois standing in the name of the decedent, or in trust for him, (which of necessity recognizes a correlative obligation on the part of an Illinois executor or administrator to pay a tax on a transfer of stocks or loans in the State of New York standing in the name of a decedent or in trust for him to the public authorities of that state), *Section 10* provides as follows:

"When any amount of said tax shall have been paid erroneously to the State Treasurer it shall be lawful for him on satisfactory proof rendered to him by said County Treasurer of said erroneous payments to refund and pay to the executor, administrator or trustee, person or persons who have paid any such tax in error the amount of such tax so paid; provided that all applications for the repayment of said tax shall be made within two years from the date of said payments."

The plaintiff in error was thus in a position at any time prior to November 26th, 1902, to apply to the Illinois authorities for repayment of the tax paid on the money deposited in New York. If she has not made such application the fault is her own.

VI.

The decision sought to be reviewed does not deny full faith and credit to any public acts, records or judicial proceedings in the State of Illinois.

It is claimed that because proceedings were instituted in the County Court of Cook County, Illinois,

imposing a succession tax based on the money deposited by the decedent in New York under the Illinois inheritance law, that such proceedings debarred the State of New York from enforcing its own law relative to the taxation of transfers.

In effect this is a claim that double taxation is unconstitutional. That it is not is fully considered under Point V.

If the contention of the plaintiff in error means anything it is that because Illinois has sought to impose a tax upon the succession to certain property no other state can impose such tax, even though it has jurisdiction over a decedent's property. The contention is in direct conflict with the adjudged cases.

In *Bonaparte vs. Tax Court (104 U. S., 592)*, a resident of Baltimore, Md., returned, in accordance with the law of that state, to the proper board of assessors, that she owned certain stocks, issued under the laws of the States of New York and Pennsylvania, and claimed their exemption from taxation because they were of a public character, except a portion of the stock of the City of Philadelphia which had always been subjected by Pennsylvania to a tax which she had paid to that state.

The claim for exemption was disallowed, and it was claimed that thereby the full faith and credit clause of the Constitution was violated. Chief Justice WAITE, however, said :

" We are unable to give such an effect to this provision. No state can legislate except with reference to its own jurisdiction. One state cannot exempt property from taxation in another. Each state is independent of all the others in this particular."

In *C. N. Nelson Lumber Co. vs. Town of Loraine (22 Fed. Rep., 60)*, it was held that where a tax is lawfully levied on property in one State the constitutionality of such tax is not affected by the fact that such property is again subjected to taxation in another State to which the owner has removed. Neither does

the fact that the lands on which logs are grown are assessed for taxation in May and the logs cut therefrom are assessed for taxation in the following April render the tax void on the ground that it is double taxation.

If it is claimed that the proceedings in the County Court of Cook County are to be given full faith and credit as an adjudication, that claim cannot be supported since neither the State of New York nor any of its officers, nor anybody representing it, was a party to those proceedings, and, for the reasons considered in *Johnson vs. Powers* (*139 U. S., 156*), they have no binding force against the defendants in error.

As was said in *Stacy vs. Thrasher* (*6 How. U. S., 44*), and the language was adopted in the case cited:

"The laws and Courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta.* It cannot be even *prima facie* evidence of a debt; for if it have any effect at all it must be as a judgment, and operate by way of estoppel."

If a contrary rule were adopted the collection of a succession tax on the property of a non-resident by any State could be easily prevented and the system of taxation now in general vogue practically nullified.

VII.

The statute does not deprive the plaintiff in error of any of the privileges and immunities of citizens of the State of New York.

The act under consideration seeks to tax the right of succession to all property within the State, whether

it belongs to a resident or a non-resident. It certainly creates no exception in favor of a resident of the State. It gives him no privilege or immunity. Non-residents are only taxed on the right of succession to property within the State, while residents of the State are subjected to a tax upon all of their property wherever it may be situated.

In *Mager vs. Grima (8 How., U. S., 490)*, a similar tax upon aliens was declared to be constitutional, and in *Wallace vs. Meyers (38 Fed. Rep., 184; appeal dismissed, 154 U. S., 523)*, a similar conclusion was reached with respect to the New York inheritance tax of 1885.

Speaking of an objection made to a tax on "property situated within the State of Louisiana, except such as is expressly exempted from taxation by the constitution, Mr. Justice BRADLEY said in *Brown vs. Houston (114 U. S., 622, 635)*:

"We are unable to see how or in what respect any equality of privileges as citizens has been denied to the plaintiffs by the imposition of the tax. Their property was only taxed like that of all other persons, whether citizens of Louisiana or of any other state or country. Not the slightest discrimination was made."

VIII.

The act does not violate the Fourteenth Amendment to the Constitution of the United States.

(A) It does not abridge the privileges and immunities of the plaintiff in error.

As has been frequently stated, the plaintiff in error had no right to succeed to the decedent's ownership of the property which is made the basis of taxation here, except by force of the sovereign will and through its

grace. The requirement of the payment of a succession tax, instead of the absolute appropriation by the State of all of the property in accordance with its inherent power, was an act or leniency and not a deprivation of any privilege of immunity secured to her.

(B) It does not deny to her the equal protection of the law.

In *Magoun vs. Illinois Trust & Savings Bank (170 U. S., 283)*, it was held that although the inheritance tax of Illinois made a classification for taxation by imposing a graded or progressive tax, the Legislature had the power to create such classification without contravening the Constitution. Mr. Justice McKenna said:

"The clause of the Fourteenth Amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances' (Kentucky Railroad Tax Cases, 115 U. S., 321, 337). It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory in which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. * * * With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern."

The cases of *Bell's Gap Railroad vs. Pennsylvania (134 U. S., 232); Giozza vs. Tiernan (148 U. S., 657); Pacific Express Co. vs. Seibert (142 U. S., 339); Merchants' Bank vs. Pennsylvania (167 U. S., 461), and Davidson vs. New Orleans (96 U. S., 97, 105)*, are then

cited, and the language of Mr. Justice MILLER in the latter case, that "the Federal Constitution imposes no "restraints on the state in regard to unequal taxation," was approved.

In *Orr vs. Gilman (183 U. S., 278)* the constitutionality of the Transfer Tax Law of New York was attacked on this ground, and Mr. Justice SHIRAS, after reviewing the cases, and particularly *Carpenter vs. Pennsylvania (17 How., 456)*, said:

"In the light of the principles thus established we are unable to see in this legislation of the State of New York, as construed by its highest court, any infringement of the salutary provisions of the Fourteenth Amendment. There are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation are applied to the lawful uses of the state, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation. * * * These views of the Court of Appeals must be accepted by us as accurate statements of the law of the state; and though it is claimed in the brief of counsel for the plaintiffs in error, that such a construction of the transfer tax law brings it into conflict with the Fourteenth Amendment of the Constitution of the United States, we are unable to approve such a contention. The subject dealt with is one of state law, expounded by state courts. The laws and the construction put upon them apply equally to all persons in a like situation and cannot be regarded as conflicting with the provisions of the Federal Constitution."

(C) It does not deprive the plaintiff in error of her property without due process of law.

1. The statute provides for the fullest notice to all persons affected by the tax, and gives the amplest opportunity to be heard before its imposition, and this right was availed of by the plaintiff in error. This constitutes due process.

As was said in *Davidson vs. New Orleans* (*96 U. S., 97, 104*):

"Whenever by the laws of a state or by state authority a tax, assessment, servitude or other burden is imposed upon the property for the public use, whether it be for the whole state or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

It is enough if the law provides for a board of review authorized to hear complaints respecting the justice of an assessment, and prescribes the time during which and the place where such complaints may be made.

Hagar vs. Reclamation District, 111 U. S., 701, 710.

This doctrine has been so frequently applied that it will suffice to cite a few of the well-known cases on the subject.

Spencer vs. Merchant, 125 U. S., 345.
Palmer vs. McMahon, 133 U. S., 660, 669.
Lent vs. Tillson, 140 U. S., 316, 327.
Pittsburg, &c., R. R. Co. vs. Backus, 154 U. S., 421.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 168.
Merchants' Bank vs. Pennsylvania, 167 U. S., 467.

2. The question as to whether or not the property on which the tax now under consideration is based was within the State of New York for jurisdictional purposes, has been sufficiently treated under Point III.

3. The criticism on the regularity of the procedure of the Appellate Division in reversing the Surrogate's decision presents no Federal question, nor has it any merit.

Under the provisions of the Tax Law which were in force at the time of the institution of these proceedings the Comptroller of the City of New York was empowered to initiate them. By Chapter 173 of the Laws of 1901 the State Comptroller was thenceforth made the representative of the State for the institution of proceedings for the collection of the transfer tax. The appeal from the decision of the Surrogate was taken by the Comptroller of the City of New York after the passage of this act and the plaintiff in error claims that such appeal was irregular.

A motion was made to the Appellate Division to dismiss the appeal, which was denied on the ground that the proceedings having been properly instituted by the Comptroller of the City of New York, they must necessarily be conducted in his name until the substitution of the Comptroller of the State of New York (Rec., pp. 78–86). Leave to appeal to the Court of Appeals from the order denying the motion to dismiss was denied, and that Court in all respects affirmed the decision of the Appellate Division.

(a) This feature of the case involves a mere question of State practice and procedure and the interpretation by the New York Courts of the State statutes regulating such procedure, and is not one of Federal cognizance.

Chief-Justice WAITE in *Walker vs. Sauvinet* (92 U. S., 90, 93) said :

" Here the state court has decided that the proceeding below was in accordance with the law of the state ; and we do not believe that to be contrary to the constitution or any law or treaty of the United States."

Mr. Justice GRAY said in *Central Land Co. vs. Laidley* (*159 U. S., 112*) :

" When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States."

As further indicating that no Federal question is involved in this regard attention is called to

O'Neil vs. Vermont, 144 U. S., 323.
Duncan vs. Missouri, 152 U. S., 377, 383.
Moore vs. Missouri, 159 U. S., 673, 679.

(b) Even if the circumstances adverted to had created a Federal question it was not raised in any of the State courts, and it does not appear on the record that any right, privilege or immunity involved in this question of practice was specially set up or claimed at the proper time or in the proper way.

Leeper vs. Texas, 139 U. S., 461.
O'Neil vs. Vermont, 144 U. S., 323.

(c) The State of New York was the beneficiary of the tax and the real party interested in the collection thereof, and acted through its duly authorized officers in seeking to review the adverse decision of the Surrogate's Court in strict conformity with the statute.

Tax Law, §§ 222, 225, 228, 229, 230, 235, 237, 242.

(d) The right to appeal from the final order of the Surrogate was not derived from the Tax Law, but from the provisions of the *New York Code of Civil Procedure, §§ 2568–2573.*

Morgan vs. Warner, 45 App. Div., 424.
People ex rel. Burnham vs. Jones, 110 N. Y., 509.

(e) The amendment of 1901 did not deprive the Comptroller of the City of New York of his right to appeal, since the act applied only to proceedings instituted after it took effect and did not have any retrospective operation.

Mahoney vs. Bernhard, 45 App. Div., 449; affd. 169 N. Y., 589.
N. Y. & Oswego R. R. Co. vs. Van Horn, 57 N. Y., 473, 478.

(f) By virtue of the provisions of Section 31 of the Statutory Construction Law (N. Y. Laws 1892, Chap.

677), the right to prosecute the appeal to final effect in the same manner as it might have been done if the Act of 1901 had not been passed was expressly saved.

Matter of Prime, 136 N. Y., 347, 355.
Cameron vs. N. Y. & Mt. Vernon Water Co., 133 N. Y., 336.

(g) The plaintiff in error was in no manner prevented from prosecuting her appeal. Her day in Court was never taken from her. Her present complaint, that the defendant in error should have been prevented from prosecuting an appeal from the decision of the Court of first instance within the time prescribed by law for the taking of an appeal, does not involve a claim of violation of any right secured to her by the Federal organic law.

4. The failure of the assessors to deduct from the value of the property upon which the tax was based the amount of the Illinois inheritance and the Federal legacy tax in like manner presents merely a question of procedure and not one of constitutional right, and involves no error.

Under the terms of the Transfer Tax Law the tax levied by this State accrued at the instant of the decedent's death, and was measured by his interest in property belonging to him within this State, and not by the interest of the beneficiaries under the will. It necessarily follows that the property of the decedent is to be appraised at its fair market value at the time of death, regardless of the taxes which the beneficiaries under the will are required to pay, before enjoying the decedent's estate, by the statutes of other governments that impose a tax thereon.

Matter of Gihon, 169 N. Y., 443.
Matter of Swift, 137 N. Y., 77.
Matter of Kennedy, 20 Misc., 501.
Matter of Becker, 26 Misc., 633.
Matter of Irish, 28 Misc., 647.
Matter of Curtis, 31 Misc., 83.

In the present case no evidence was offered by the plaintiff in error as to the amount of the Federal leg-

acy tax. The amount of the Illinois tax does appear, but, as has been shown, an ample remedy exists under the statutes of Illinois to recover back any tax erroneously paid to that State. But, even if it could not be recovered, the proposition now under consideration, if it presents any constitutional aspect, is that of double taxation, which, as has been seen, involves no infraction of the Fourteenth Amendment.

It is, however, urged that this part of the discussion merely relates to the amount of tax payable under the laws of New York. It refers to the action of the appraisers in fixing the basis for the assessment to the same degree as would have been the case if the property assessed had been chattels. Surely this Court could not be called upon to review the findings of the appraisers as to value of property assessed, or as to the amount of an assessment. That would involve a question of fact, or of interpretation, as to which the appraisers and the State Courts might possibly have been in error, inasmuch as such error, however, would not involve the validity of the law under which the tax is assessed, the action of the State Courts in administering the act must be deemed conclusive under the rule laid down in *Morley vs. Lake Shore R. R. Co. (146 U. S. 167)*.

Moreover, the record fails to show that any Federal question was raised with regard to the matter now under discussion.

IX.

The plaintiff in error cannot escape taxation on the pretence that the money deposited by the decedent was only transitorily within the State of New York at the time of his death.

The stock of the Chicago and Alton Railroad Company belonging to the decedent was sent to New York

on March 29th, 1899. The proceeds were entered as cash in the account of the decedent upon the trust company's ledger entitled "Deposits in Trust. Draft Account" on March 31st, 1899. The money remained in the custody of the trust company continuously from that time until May 26th, 1900, when Mr. Blackstone died. He was in receipt of interest thereon during the interim.

While it is said that it was the ultimate intention of the testator to invest these proceeds, and, although, it is alleged in the answer that they were allowed to remain in the City of New York "to avoid the risk and expense of their transfer to Chicago, and their probable retransfer to New York when he had determined what permanent investment of them he should make," the fact remains that for fourteen months they remained within the State of New York, and were practically invested during that time accumulating interest in accordance with the arrangement made between the trust company and Mr. Blackstone.

Assuming for the sake of the argument that under the law of taxation there is a legal distinction between property in transit and that which is not, it certainly is difficult to understand how a fund which is within the State for so protracted a period as fourteen months, under the conditions indicated, can be said to be temporarily within the State.

Counsel for the plaintiff in error frankly says in his brief (p. 56), referring to the claim that Mr. Blackstone was prevented by his increasing ill health from permanently investing this money:

"Now, whether the incapacity lasted for three days "or three years seems immaterial. The temporary "character of the situation of the indebtedness in the "State of New York and the fixed purpose to remove "it at the earliest practicable time, a purpose which "was only frustrated by death, constitute the controll-"ing facts."

If the fact that a fund remains within the State of New York for three years under such circumstances is

immaterial, why would not a period of thirty years be equally immaterial? Where is the line to be drawn? Who is to determine whether property is temporarily within the boundaries of a State or not? Is the unexpressed intention of the owner of the property to govern? Or is a self-serving declaration made by him to control?

The view most favorable to the party taxed that could be taken of this subject is, to leave it as a question of fact to be determined by the taxing officer or by the State Courts. It certainly does not rise to the dignity of a Federal question.

The Court of Appeals has declared, not only in this case but also in the *Romaine Case (127 N. Y., 82, 89)*, that the money of the decedent was not temporarily within the State; and it is believed that that view is not reviewable here.

The cases relied on by the plaintiff in error have no application.

In *St. Louis vs. Ferry Company (11 Wall., 423)* the ferryboats sought to be taxed in St. Louis belonged to an Illinois corporation, and their relation to the City of St. Louis was simply that of contact, as one of the termini of their voyage, and, therefore, were not taxable under a law affecting boats *within* the state.

Particular attention is called to the language of Mr. Justice SWAYNE, on page 430, which sustains in various respects the views expressed under Point III.

Coe vs. Erroll (116 U. S., 517), merely defines what is meant by goods in transit within the meaning of interstate or foreign transportation, and it was held that logs cut in New Hampshire awaiting transportation by river to Maine, were a part of the general mass of property in New Hampshire, and as such liable to taxation there.

But even if this money were deemed temporarily within the State, that fact could not avail the plaintiff in error, since the Transfer Tax Law of New York does

not exempt a non-resident's property "temporarily within the state" from taxation.

It is evident from a reading of the present act, and a study of its evolution from the Act of 1885, that it was the purpose of the Legislature to meet every possible contingency so as to make its operation coextensive with the sovereignty of the State. There is nowhere within the act a suggestion of a distinction between property temporarily and that permanently within the State. Except as restricted by constitutional enactment the power of the Legislature to impose a tax is only limited by the ability of the State to collect it.

Matter of McPherson, 104 N. Y., 306.
Matter of Bronson, 150 N. Y., 15.
Matter of Whiting, 150 N. Y., 27.

No such exemption as that claimed has been read into the statute by judicial construction. Whatever dicta there may be found in *Matter of Enston (113 N. Y., 174)* were overcome by the amendment of the collateral inheritance tax of 1885 by Chapter 713 of the Laws of 1887.

In *Matter of Romaine (127 N. Y., 80)*, Judge VANN said :

"We should hesitate before applying the statute to any property casually brought into the state for a temporary purpose, as by a visitor or traveler, but the record before us does not present such a case. It might well be held that such property, although literally 'within this state,' was not here in the sense meant by the statute, on account of the transitory and accidental character of its presence and the immediate custody of the owner. * * * Where, however, the money of a non-resident is invested in this state * * * or where the property of a non-resident is habitually kept, even for safety, in this state, we think that the statute applies both in the letter and spirit. Such property is within this state in every reasonable sense, receives the protection of its laws and has every advantage from government, for the support of which taxes are laid, that it would have if it belonged to a resident. * * * We have nothing to do with

the policy of the statute, as our duty is discharged when we declare its meaning and apply it to the case in hand."

To the same effect is *Matter of Burr* (16 Misc., 89).

It is an elementary principle of taxation that the subject should be certain. This is as important for the person who ultimately pays the tax as it is for the State which collects it. If the identification of the property to be taxed requires the solution of complicated questions of fact, serious difficulties ensue equally burdensome to the citizen and unfortunate to the State.

If the taxability of personalty of non-residents found within the State should depend on the ascertainment of the purpose of the decedent in bringing his property into this State, of his intention with regard to leaving it here, and as to his ultimate desires, the administration of the law would become fraught with serious problems, its application would become uncertain, would lack uniformity and might depend largely upon the judgment, discretion, caprice and personal views of taxing officers and courts of original jurisdiction.

X.

It is respectfully submitted that the order appealed from should be affirmed,

Dated January 2, 1903.

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